Petition

81-177

No. ___

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN SMELTING AND REFINING COMPANY AND FEDERATED METALS COMPANY, corporations authorized to do business in the State of New Jersey,

Petitioners,

—vs.—

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and its LOCAL UNION, No. 365, Labor Organizations,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Dated: July 27, 1981

QUESTIONS PRESENTED

(1) Whether this Court's decision in *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO,* 430 U.S. 243 (1977), *reh. denied,* 430 U.S. 988 (1977), holding that arbitration obligations under collective bargaining agreements do not automatically terminate at contract termination, requires arbitration of the following:

(a) disputes arising six and nine months after contract termination, a prolonged economic strike and resultant plant closing;

(b) disputes involving rights alleged to have been earned after contract termination;

(c) disputes with respect to agreements which contain extremely limited arbitration agreements, and which show no strong confidence in or preference for arbitration.

(2) Whether a labor arbitration award based solely on the arbitrator's own concepts of equity may be confirmed on the ground that if the arbitrator had engaged in contract interpretation, he could have reached the same conclusion.

(3) Whether an arbitration award which impliedly presumes, without determining the intent of the contracting parties, that this Court's decision in *Nolde Brothers, Inc. v. Local 358, Bakery & Confectionery Workers Union, AFL-CIO,* 430 U.S. 243 (1977), *reh. denied,* 430 U.S. 988 (1977), requires survival of the substantive provisions of a collective bargaining agreement, has a rational nexus to or draws its essence from the expired collective bargaining agreement simply because the law permits parties to a contract to agree to provisions which may survive the termination date.

PARTIES TO THE PROCEEDING

The petitioners in this proceeding are: American Smelting and Refinery Company and its wholly-owned subsidiary, Federated Metals Corporation.*

The respondents are: the United Steelworkers of America, AFL-CIO, and its Local, Perth Amboy Smelter and Refinery Workers Union No. 365.

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* Pursuant to Rule 28.1 of the Rules of the Court, the following is a list naming all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of petitioner American Smelting and Refining Company, Incorporated: Alta Mining and Development Company, Blackhawk Mining and Development Company, Limited, Compania Minera Quioma S.A., Micro Image Incorporated, Fairview Mining Company, Limited, Federated Genco Limited, Government Gulch Mining Company, Limited, Green Hill Cleveland Mining Company, Liard River Mining Company Ltd. (N.P.L.), Mexico Desarrollo Industrial Minero, S.A., M.I.M. Holdings Limited, Lesarco, Inc., Neptune Mining Company, Corporacion Minera Nor Peru, S.A., Revere Copper and Brass Incorporated, Conalco Revere Realty Company, Ormet Corporation, Southern Peru Copper Corporation, Southern Peru Copper Sales Corporation, and Wyoming Mining and Milling Company, Limited.

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AMERICAN SMELTING AND REFINING COMPANY AND FEDERATED METALS COMPANY, corporations authorized to do business in the State of New Jersey,

Petitioners,

—vs.—

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and its LOCAL UNION, No. 365, Labor Organizations,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, American Smelting and Refining Company (hereinafter referred to as "ASARCO") and Federated Metals Corporation (hereinafter referred to as "FMC"), pray that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit in *United Steelworkers of America, et al. v. American Smelting & Refining Company, et al.*, and *Federated Metals Corporation v. United Steelworkers of America, et al.*

Opinions Below

United Steelworkers of America, et al. v. American Smelting & Refining Company, et al.

The opinion of the court of appeals is not officially reported. It is unofficially reported at 91 CCH Lab. Cas. ¶ 12,752 and 107 LRRM 2271 (3d Cir. 1981). It appears in Appendices A and B to this petition.

The decision of the United States District Court for the District of New Jersey enforcing the arbitration award is not reported. It appears in Appendix D to this petition. The opinion and award of arbitrator Eric J. Schmertz is not reported. It appears in Appendix K to this petition.

Federated Metals Corporation v. United Steelworkers of America, et al.

The opinion of the court of appeals is not officially reported. It is unofficially reported at 91 CCH Lab. Cas. ¶ 12,725 and 107 L.R.R.M. 2271 (3d Cir. 1981). It appears in Appendix C to this petition.

The decision of the United States District Court for the District of New Jersey is not reported. It appears in Appendix G to this petition.

Statement of Jurisdiction

The judgments of the court of appeals were both entered on April 28, 1981 (Appendices A, C) and this petition is filed within 90 days thereafter. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statute Involved

Section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or

between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. Background

In 1974, ASARCO entered into a collective bargaining agreement and Pension and Disability Agreement with the United Steelworkers of America (AFL-CIO) and its Local Union, No. 365 (hereinafter referred to jointly as the "Union").

At that time, ASARCO was the owner and operator of a copper refinery and manufacturing plant for lead and copper alloy products in Perth Amboy, New Jersey, but during the term of the contract it began a phase-out of the refinery, completed in June 1977. Right before final closure of the refinery, on April 1, 1977, the rest of the Perth Amboy facility—a continuous-cast copper alloy plant and lead products plant—was acquired by FMC. FMC employed approximately 94 former ASARCO hourly employees in connection with its acquisition of the plant and assumed the ASARCO 1974-1977 Collective Bargaining Agreement (hereinafter referred to as the "ASARCO Agreement") and Pension and Disability Agreement (hereinafter referred to as the "Pension and Disability Agreement"). Both agreements were to terminate, by their respective terms, on June 30, 1977.

During June 1977, representatives of FMC and the Union met to negotiate a new collective bargaining agreement and pension and disability agreement. However, those meetings were unsuccessful, and on July 1, 1977, the Union commenced an economic strike and picketing against FMC. Among the terms and conditions of employment at issue were pension benefits and the ASARCO Security and Severance Pay Plan. The Union insisted on continuance of the old plan, and FMC wanted adoption of provisions more consistent with industry practice.

Contract negotiations over these and other terms continued during the strike, but by December 29, 1977—after seven months of negotiations and six months of strike—FMC considered negotiations to be at an impasse. The Union refused to move from its demands, and FMC could not accept those demands without making the Perth Amboy facility noncompetitive in the industry. Accordingly, FMC determined that it would be necessary to close the Perth Amboy plant, despite the fact that there was work to be done. It communicated this intent to the Union on December 29, 1977, and made a public announcement of closing on January 11, 1978.

On January 19, 1978—nearly seven months after termination of the ASARCO Agreement—the Union submitted a demand for security and severance pay and October 2, 1978—15 months after termination of the ASARCO Agreement—it demanded arbitration of several pension and disability claims.

B. The Pension Dispute: *Federated Metals Corporation v. United Steelworkers of America, et al.*

The Union's pension claims were based on the ASARCO Retirement Income Plan for Hourly-Rated Employees (Appendix M) (hereinafter referred to as the "Retirement Plan"), a longstanding program applicable to employees at a number of locations throughout the United States, as well as on the Pension and Disability Agreement (Appendix N) which contained collectively bargained amendments to and variations from the multi plant Retirement Plan.

The Retirement Plan reserved to ASARCO broad powers and discretion with administration, leaving interpretation and determinations as to eligibility to its Pension Board.[1] The sole exception thereto was a very specific and limited arbitration

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1 Section 11.3 thereof provided in pertinent part as follows. "The Pension Board shall establish rules and regulations for the administration of the Plan and, except as otherwise expressly provided in the Plan, the interpretation of the Plan and determination of any question as to the eligibility for or amount of benefits and months of Continuous Service of an Employee or any question whatsoever arising in connection therewith, shall rest entirely with the Pension Board" (Appendix M at 96).

agreement, set forth in the Pension and Disability Agreement. Article II, Section 1 thereof subjected three types of disputes to arbitration:

> (a) the number of years of Continuous Service of an Employee; (b) the age of such employee; or (c) whether permanent and total disability did or did not result from the cause listed in sub-paragraphs (1), (2) or (3) of sub-section (b), Sections 1 of Article II. (Appendix N at 100)

The Union request for arbitration pursuant to this provision was submitted October 2, 1978, approximately 15 months after termination of the Pension and Disability Agreement. The Union claimed that six employees were entitled to "70/80" pensions[2] because they had continued to earn service credits for such after termination of the ASARCO Agreement and Pension and Disability Agreement and while they were on strike. It is undisputed that one of the six had attained the requisite combination of age and service credits during the term of the Pension and Disability Agreement pursuant to which they were alleged to have been earned.

FMC rejected the Union's demands for arbitration of these claims on the ground that both the Company's agreement to arbitrate, and the employees' right to earn service credits under the Pension and Disability Agreement had terminated on June 30, 1977, when that agreement itself had terminated. It instituted an action, *Federated Metals Corporation v. United*

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2 Article I, Section 2 of the Pension and Disability Agreement provided, in pertinent part, as follows: "*Amount of Retirement Income Benefits.* The amount of Retirement benefit for eligible employees retiring subsequent to the Effective Date shall be computed as follows: . . . (b) *Early Retirement.* Any Employee shall be eligible to retire prior to Normal Retirement Date provided the conditions set forth in one of the following paragraphs are satisfied: *70/80 Formula.* Any Employee who is laid off due to the permanent shutdown of the total Plan at which he or she is employed and which is covered under the Agreement may elect to retire and receive a "70/80" retirement benefit, provided such employee: (1) has reached age 55 and attained age plus Continuous Service totals 70 years or more, or (2) has not reached age 55 and attained age plus Continuous Service totals 80 years or more . . ."

Steelworkers of America, et al., in the United States District Court for the District of New Jersey, pursuant to Section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, *et seq.*, to stay the arbitration sought by the Union.

The district court ruled in favor of the Union,[3] finding the pension disputes arbitrable under this Court's decision in *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977), *reh. denied*, 430 U.S. 988 (1977) (Appendix G). FMC filed a notice of appeal therefrom,[4] and on April 28, 1981, the Third Circuit entered its opinion and judgment affirming the district court in all respects.

C. The Security and Severance Pay Dispute: *United Steelworkers of America, et al. v. American Smelting & Refining Company, et al.*

The Union's security and severance pay grievance, asserted January 19, 1978 was based on Article XV of the ASARCO Agreement, which had provided for the payment of severance pay (which was based on length of service) and security (in a uniform amount) to eligible employees laid off for lack of work.[5]

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3 The Union had also sought arbitration with respect to two disability claims. The district court held those claims non-arbitrable because not within the classes of disputes subject to arbitration under the Pension and Disability Agreement (Appendix G at 69).

4 The Union filed a notice of cross appeal from the district court's holding that the Union's disability claims were not arbitrable.

5 Article XV of the ASARCO Agreement provided in pertinent part as follows:

> "FORMULA: 1 percent of Average Annual Earnings Times Years of Service, Plus $30.00 Times Years of Service. (*Annual Earnings:* Straight Time Hourly Earnings, which exclude *all* pay premiums of whatever nature, for the 12 consecutive calendar months immediately preceding date of lay-off, retirements, or death divided by the straight time hours worked, multiplied by 2,080 hours). ELIGIBLE All Employees upon completion of Two (2) Years Service. (All

The Union claimed that the employees terminated in connection with the plant closing after a six-month strike had been laid off for lack of work and were, therefore, entitled to these benefits. FMC, however, denied that claim on the ground that the ASARCO Agreement was no longer in effect and, further, that the employees had been terminated due to the inability of the parties to enter into a collective bargaining agreement, not laid off for lack of work. The Union's subsequent demand for arbitration of the claim was also rejected by FMC on the ground that its agreement to arbitrate had terminated six and one-half months earlier, when the ASARCO Agreement terminated.

When FMC refused to submit to arbitration, the Union instituted suit to compel arbitration.[6] On July 18, 1978, the district court ordered that the question of arbitrability and—depending on the arbitrator's decision on arbitrability—the substantive dispute over security and severance pay be submitted to arbitration. Accordingly, the parties proceeded to arbitration before arbitrator Eric J. Schmertz on October 30, 1978.

"Years Service" shall be based on the Plant's Seniority Lists). PAYMENTS *Laid-off Employees* (for lack of work only): After 14 calendar days on lay-off, $50.00/week until either: (a) Employee is recalled. (b) Exhaustion of his amount accrued by Formula; provided, however, that the first twelve (12) weekly payments (if the employee is laid off that long) shall not be deducted from his amount accrued by Formula nor for those weeks for which the employee received State Unemployment Compensation. (c) Fifty-two weeks, whichever first occurs. In the event of (c) and an amount accrued remains, the employee shall have the option of: the remaining amount continuing on accrual; *or* receiving the remaining amount accrued in a lump-sum payment. Payments shall be made without regard to: (1) Any other benefit or payment received by the employee. (2) His employment status except as covered in (a) above. (3) An employee laid-off, recalled before (b) occurs and is subsequently laid-off, shall have an accrued amount based on total years of service (figures to nearest complete calendar quarter) *less total* deducted payments received" (Appendix L at 89-90).

6 The action was commenced by the Union in the Superior Court of New Jersey and removed by FMC to the United States District Court for the District of New Jersey, pursuant to Section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185.

Arbitrator Schmertz ruled in favor of the Union on both the question of arbitrability and the merits of the security and severance pay claim (Appendix K). His decision on arbitrability was based solely on deference to this Court's decision in *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union, supra.* The arbitrator commenced his discussion of arbitrability with a statement that, "despite any private reservations" he might have about *Nolde,* he was "bound to its holdings and [might] not under similar facts and law substitute [his] judgment for that of the Court" (Appendix K at 81). He did not address FMC's contention that even if a *Nolde* presumption of post-contract arbitrability were applicable, it could not endure for six and one-half months after termination.

The arbitrator's decision on the merits of the security and severance pay claim was similarly unrelated to the terms of the ASARCO Agreement. He recognized the limitation of security and severance pay to employees who were laid off for lack of work, and, indeed, found that "the employees were *not* at work, presumably would not have accepted work even if made available unless a new contract with acceptable terms had been agreed upon and hence may be deemed to have contributed to or shared in some of the responsibility for the plant closing" (Appendix K at 83). However, he refused to consider those facts in rendering the decision, on the ground that the employees should not suffer detriment on account of a lawful economic strike (Appendix K at 83).

Having thus eliminated the cause of the FMC plant closing and terminations from consideration, the arbitrator concluded there was no significant difference between ASARCO's 1976 plant closing (which was unrelated to bargaining problems) and the FMC plant closing, and held that since ASARCO had provided security and severance pay, FMC was required to do the same (Appendix K at 83-84). He did not find it necessary to address the additional fact that there was no collective bargaining agreement in effect when FMC closed the plant and terminated its striking employees.

The Union's security and severance pay claims were then returned to the district court, pursuant to Section 301 of the

Labor Management Relations Act, 1947, 29 U.S.C. § 185, on the Union's action to enforce and FMC's counterclaim to vacate the arbitrator's award.

The district court ruled in favor of the Union, confirming the arbitration award in all respects (Appendices D-F). FMC filed a notice of appeal therefrom, and on April 28, 1981, the Third Circuit affirmed (Appendix A). Judge Rosenn dissented in part, finding the arbitrator's award of security and severance pay to be in manifest disregard of the collective bargaining agreement (Appendices A, B).

REASONS FOR GRANTING THE WRITS

I.

THE THIRD CIRCUIT DECISIONS EXTENDING THE SCOPE AND DURATION OF POST-CONTRACT ARBITRABILITY RAISE IMPORTANT QUESTIONS WHICH SHOULD BE SETTLED BY THIS COURT.

In *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union,* 430 U.S. 243 (1977), *reh. denied,* 430 U.S. 988 (1977), this Court held that arbitration duties under collective bargaining agreements do not automatically terminate at the moment of contract termination. *Id.* at 253. The Court stated that the intent of the parties is controlling but where a clear preference for arbitration during the term of the contract is shown and no *indicia* of contrary intent are present, it may be assumed that the parties did not intend to exclude from arbitration disputes arising under, but asserted shortly after contractual termination. *Id.* at 252-53.

Of equal import is what this Court did not hold in *Nolde.* It did not hold either that *all* post-contract disputes are arbitrable, or that arbitration agreements *always* survive contract termination. Rather, post-contract arbitrability—like arbitrability during the term of a contract—must be determined by ascertaining the intent of the parties. *Id.* at 253. The Court further did not hold that its presumption of intent to arbitrate after contract termination lasts forever; it limited its holding in

Nolde to disputes arising within a reasonable time after contract termination. 430 U.S. at 255 n.8.

Petitioner submits that the Third Circuit decisions herein improperly ignore these limitations. Although purporting to apply *Nolde,* the court of appeals in fact extended it in a manner unsupported by precedent or policy considerations, raising important questions of labor-management relations warranting review by this Court.

A. The court of appeals improperly extended the presumption of post-contract arbitrability to disputes not arising within a reasonable time after contract termination.

In *Nolde,* contract termination, the plant closing on which the grievance was based, and the union request for arbitration all occurred contemporaneously. The contract was terminated by the union effective August 27, 1973, the company announced its decision to close the plant on August 31, and all operations in the plant were terminated shortly after midnight the same day. The union's severance pay grievance was asserted "shortly" thereafter. 430 U.S. at 246-47.[7]

In that factual context, *Nolde* was, as the Court noted, but a small extension of prior decisions. 430 U.S. at 251-52. In *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964), the Court had held a successor employer bound under its predecessor's expired collective bargaining agreement to arbitrate with respect to a dispute submitted shortly prior to contract termination. Similarly, in *Piano & Musicial Instrument Workers Union, Local No. 2549 v. W. K. Kimball Co.,* 379 U.S. 357 (1964), an employer was held obligated to arbitrate a dispute over recall rights under an expired collective bargaining agreement. No demand for arbitration had been made during the term of the contract in that case, but a union demand for recognition of the recall rights had been made nearly a month before contract termination.

On the basis of these prior decisions, the Court held in *Nolde* that the fact that the severance pay dispute there at issue

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7 None of the opinions in *Nolde* indicates the precise date the severance pay grievance was asserted.

arose "shortly after, rather than before, contract termination" did not preclude a finding of arbitrability. 430 U.S. at 252. There was, indeed, slight practical factual difference among the cases. Although the dispute in *Nolde* arose after contract termination, it was but four days after—during which four days the employees had worked—and the Union's demand for arbitration was asserted shortly thereafter. Thus, on the basis of the parties' contract and federal labor policy, the Court concluded that intent to arbitrate that post-contract dispute could be presumed. 430 U.S. at 252-53. It indicated, however, that its presumption of post-contract arbitrability might not be applicable in all circumstances, and specifically declined to extend its ruling to grievances which, unlike that before it, are not asserted shortly after contract termination:

> [W]e need not speculate as to the arbitrability of post-contract claims which, unlike the one presently before us, are not asserted within a reasonable time after the contract's termination. 430 U.S. at 255, n.8

Despite this clear limitation, the Third Circuit found little significance herein in the fact that the disputes before it arose not four days after contract termination, as in *Nolde*, but, rather, six and one-half months and nine months after contract termination. Except in unspecified extreme circumstances, the court of appeals held, the proper inquiry is not how long after contract termination the dispute arose or how the parties' relationship may have changed in the interim, but whether the union delayed unreasonably between gaining knowledge of the grievance and demanding arbitration (Appendix C at 50). In short, the court of appeals concluded, whether a grievance is asserted within a reasonable time after contract termination is, in the usual case, a mere question of laches.

Petitioners submit that this holding misconstrues *Nolde* to the point of transforming a presumption as to intent into a rule of mandatory post-contract arbitration. In the circumstances of *Nolde*, it may easily be assumed that the parties intended, at the time of drafting their arbitration agreement, to include a dispute arising four days after contract termination when the employer-employee relationship was still intact. Here, in con-

trast, it is difficult, indeed, to imagine that the parties intended, upon entry into a three-year contract, to arbitrate disputes arising six and nine months following contract termination, a six-month economic strike, and a resultant plant closing. It simply cannot be concluded that the Third Circuit's finding of arbitrability in these circumstances was in any way based on intent—either actual or implied—which, of course, is controlling in all questions of arbitrability. *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 374 (1974).[8]

The Third Circuit's temporal extension of the presumption of arbitrability has the further effect of altering the balance of union-management power. The court of appeals cites as a basis for presuming intent to arbitrate six or nine months after contract termination the fact that during part of that period the parties were negotiating—unsuccessfully—for a new contract. It does not mention, however, that those negotiations took place during a strike—a strike, moreover, which concerned, among other things, the Union's insistence upon extension of the Security and Severance Plan and Pension and Disability Agreement upon which their present grievances are based. The court of appeals further considered insignificant the fact that the ASARCO agreement specifically prohibited strikes while a grievance was pending and provided that any grievance or arbitration proceedings in progress at the time of a strike were to be suspended until the employees were back at work (Appendix L at 89).

Petitioner submits that this reasoning by the Third Circuit is seriously in error. It is, first, an implicit holding that there is no

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8 It is particularly difficult to impute such intent to contracts which, like those herein, were entered into in 1974. It was generally held at that time that employers could not be compelled to arbitrate any disputes arising after contract termination. *See, e.g., IAM Local Lodge 2369 v. Oxco Brush Div. of Vistron Corp.*, 517 F.2d 239 (6th Cir. 1975); *Milk Drivers Local No. 246 v. Thompson's Dairy, Inc.*, 80 L.R.R.M. 3403 (D.D.C. 1972), *aff'd mem.*, 489 F.2d 1272 (D.C. Cir. 1974); *Flight Engineers Int'l Ass'n, EAL Chapter v. Eastern Air Lines, Inc.*, 359 F.2d 303 (2d Cir. 1966); *M. K. & O. Transit Lines, Inc. v. Div. No. 892, Amalgamated Ass'n of Electrical, R. & Motor Coach Employees of America*, 319 F.2d 488 (10th Cir. 1963), *cert. denied*, 375 U.S. 944 (1963).

quid pro quo for arbitration in a post-contract setting: The employer's duty to arbitrate under these decisions extended indefinitely; the Union's concomitant duty to refrain from economic strikes, however, apparently ends at the moment of contract termination. This holding is in clear derogation of federal labor policy which holds that the duty of arbitration—"the substitute for economic warfare"—is coterminous with the duty not to engage in economic strikes. *Gateway Coal Co. v. United Mine Workers of America,* 414 U.S. 368 (1974); *Boys Market, Inc. v. Retail Clerks Union, Local 770,* 398 U.S. 235 (1970); *Goya Foods, Inc.,* 238 N.L.R.B. 1465 (1978).

In a previous case, the Third Circuit justified its conclusion that post-contract economic strikes are irrelevant to post-contract arbitration obligations on the ground that a union which strikes in support of a new contract does not violate the no-strike clause of its expired agreement. *United Steelworkers of America v. Fort Pitt Steel Casting Division-Conval-Penn, Inc.,* 635 F.2d 1071 (3d Cir. 1980), *cert. denied,* 68 L.Ed. 2d 843 (1981). Thus, the court reasoned, the Union would be barred from seeking arbitration with respect to its proposed new contract, but still entitled to seek arbitration with respect to the expired contract.

While facially appealing, this reasoning in facts fails to address the true issue raised herein and in *Fort Pitt.* The court of appeals focuses on the question whether the union's strike violated the no-strike clause, rather than whether the duty to arbitrate can properly be extended by presumption in a situation where the union has legally chosen to engage in an economic strike. Petitioners submit that it cannot. Although the union herein did not strike over the specific grievances now at issue—they did not arise until after the six-month strike terminated by a plant closing—it did strike over the contract provisions upon which those grievances were based. In the post-contract setting, this is the equivalent of a union striking over a specific grievance and then seeking arbitration with respect to same.

Finally, in this context, the very basis of the presumption of arbitrability which the Third Circuit found controlling—this

Court's conclusion in the *Steelworkers' Trilogy*[9] that a combination of arbitration and an express or implied no-strike agreement would promote stable industrial relations—was totally lacking.

> The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement.[10]
>
> For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement to make the agreement serve their specialized needs.[11]
>
> There is no exception in the no-strike clause and none therefore should be read into the grievance clause, since one is the *quid pro quo* for the other.[12]

These considerations, which played a major role in this Court's rulings favoring arbitration, were clearly absent in the case at bar. Here, unlike *Nolde* and *John Wiley & Sons, Inc. v. Livingston, supra,* contract termination and grievance assertion were separated by a strike. As a result, there was no continuing relationship to protect; there was no *quid pro quo* for arbitration; there was not even, as there was in *Nolde,* a fear that employers could deprive their employees of severance pay by closing business operations simultaneously with contract termination, because contract termination and plant closing herein were six and one-half months apart.

In sum, the Third Circuit's extension of the presumption of arbitrability to the present cases is supported by neither policy nor precedent. In *Nolde,* this Court, although not required by

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9 *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

10 *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

11 *Id.* at 582.

12 *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 567 (1960).

the facts therein to decide how long or under what circumstances the presumption of arbitrability survives, was clearly concerned with the issue, carefully limiting its decision to grievances arising within a reasonable time after contract termination. Petitioner submits that the Third Circuit's holdings herein conflict with this Court's intention in so limiting *Nolde,* and that review should be granted for the purpose of determining whether grievances submitted six and one-half or nine months after contract termination and after a six-month economic strike are arbitrable under the rule of that case.

B. The court of appeals improperly found the *Nolde* presumption of post-contract arbitrability applicable to claims involving rights alleged to have been earned after contract termination.

In *Nolde, John Wiley & Sons, Inc. v. Livingston, supra,* and *Piano & Musical Instrument Workers Union, Local No. 2549 v. W. W. Kimball Co., supra,* the rights asserted in post-contract arbitration were all alleged to have been earned during the terms of the contracts in question and merely "triggered" shortly after contract termination. The pension claims asserted herein, in contrast, are based not on rights earned during the term of the Pension and Disability Agreement, but, rather, on the Union's asssertion that employees continued to earn service credits under the plan even after its termination, while they were on strike in support of their goal of a new contract, and, indeed, after the plant was closed.

Petitioners submit that *Nolde* is inapplicable to this type of claim; that after contract termination, there is no presumption of arbitrability with respect to rights alleged to have been *earned* after contract expiration. To hold otherwise, as the Third Circuit did herein in *Federated Metals Corp. v. United Steelworkers of America, et al.,* abrogates prior decisions of this Court and effectively binds employers indefinitely to the requirements of their expired agreements.

The court of appeals based its holding therein on the fact that this Court, in *Nolde,* did not specifically limit its decision to rights alleged to have been earned during the term of the agreement (Appendix C at 47-48). Yet, in *Nolde,* as well as in

John Wiley & Sons, Inc. v. Livingston, supra, and *Piano & Musical Instrument Workers Union, Local No. 2542 v. W. W. Kimball Co., supra,* all grievances asserted did involve rights alleged to have been earned prior to contract termination. Indeed, in *John Wiley & Sons, Inc. v. Livingston, supra,* this Court made particular note of that fact, and cautioned that post-contract arbitration could not be used "to acquire new rights . . . any more than it could have been used to negotiate a new contract with [Wiley's predecessor], had the existing contract expired and renewal negotiations broken down." 376 U.S. at 555.

That is, however, the precise action sanctioned by the Third Circuit herein. The Union struck in support of, *inter alia,* continuation of the Pension and Disability Plan without amendment but six months later, when that goal became impossible, it claimed its members had been earning new rights under the plan throughout the course of the strike. It then sought arbitration with respect to same. *Cf. Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.,* 101 L.R.R.M. 2121 (D.D.C. 1979); *Milwaukee Typographical Union No. 23 v. Madison Newspapers, Inc.,* 444 F. Supp. 1223 (W.D. Wis. 1978).

The implications of this decision are broad. To hold, as the Third Circuit has, that employers must arbitrate with respect to rights claimed to have been earned after contract termination, would work a major change in labor-management relations, requiring submission to arbitration of all manner of complaints arising during a post-contract strike, including discharges, disciplinary actions, and strike replacements. It would, further, render meaningless the termination clauses of collective bargaining agreements, requiring arbitration with respect to the survival of each substantive term of an agreement. A claim that employees earned paid vacation time while on strike after contract termination would, for example, be arbitrable under the Third Circuit rule. So would a claim that employees earned *new* seniority rights or that employees working under a *new* contract nonetheless continued to earn rights under an expired *prior* contract.

In short, as well stated by the Fourth Circuit in the decision in *Nolde* affirmed by this Court, the rule now enunciated

herein by the Third Circuit would inextricably and permanently bind employers to the terms of their expired agreements:

> Our decision should not be read as disapproving those cases that hold arbitration unavailable for resolution of individual employee grievances, or disputes involving nonaccruable rights, that arise after expiration of a collective bargaining agreement. We consider those cases different. To hold that a company had to arbitrate an employee discharge or a lockout that occurred after expiration of a contract providing for arbitration would mean that an employer who once agreed to submit its managerial actions to potential arbitration would in effect have agreed to do so for all time. That we do not hold.

Local No. 358, Bakery & Confectionery Workers Union v. Nolde Brothers, Inc., 530 F.2d 548, 553 (4th Cir. 1975), *aff'd*, 430 U.S. 243 (1977), *reh. denied*, 430 U.S. 988 (1977).

For all of the foregoing reasons, petitioners submit that the Third Circuit's requirement of arbitration with respect to rights alleged to have been earned after contract expiration is not an application of *Nolde*, but a far-reaching and improper extension thereof, warranting review by this Court.

C. The court of appeals improperly applied the *Nolde* presumption of post-contract arbitrability to an agreement which did not evidence a broad intent to resolve disputes through arbitration.

Among the factors considered by the Court in *Nolde* in determining that a presumption of post-contract arbitrability was warranted was the fact that the parties therein had agreed upon a broad arbitration clause covering "all grievances," thus expressing a clear "preference for an arbitral, rather than a judicial, interpretation of their obligations under the collective bargaining agreement." 430 U.S. at 253.

In *Federated Metals Corp. v. United Steelworkers of America, et al.*, in contrast, there was no such clear preference for arbitration. The parties did not agree to submit all disputes

under the Pension and Disability Agreement to arbitration, but only three types of routine, administrative matters: the number of years of continuous service of an employee, the age of an employee, and whether a claimed total and permanent disability resulted from a cause excluded from coverage under the Agreement (Appendix N at 100). The Pension and Disability Agreement further provided that no arbitrator would have the power to add to, subtract from, or amend the provisions thereof (Appendix N at 101).

Petitioners submit that in such circumstances where the arbitration clause is circumscribed and no preference for arbitration or strong "confidence in the arbitration process and an arbitrator's presumed special competence," 430 U.S. at 253, is shown, the *Nolde* presumption of intent to arbitrate post-contract disputes cannot be applied. First, when parties to an agreement carefully limit their arbitration duties during the term of the contract, it cannot be inferred that they had such confidence in arbitration as to intend it to apply to disputes arising after contract termination. Second, where arbitration during the term of the contract is limited to routine matters such as the accuracy of length of service calculations and records as to age, it cannot be inferred that the parties intended that post-contract disputes of great magnitude, such as the claimed right to earn service credits after contract termination, be submitted to arbitration. Indeed, the dispute here at issue—whether employees earned new rights after contract termination—could not have arisen during the agreed-upon term of the contract.

The court of appeals, however, held herein that the scope of an arbitration clause has no bearing on applicability of the presumption of post-contract arbitrability, stating that "[a]lthough the arbitration clause reviewed in *Nolde* was broad, the Court did not rely on this fact in determining that it survived contract termination" (Appendix C at 46). That statement is clearly in error. In *Nolde*, this court first emphasized that the "parties agreed to resolve *all* disputes by resort to the mandatory grievance-arbitration machinery." 430 U.S. at 253. It then noted that "[b]y their contract the parties clearly established their preference for an arbitral, rather than a

judicial, interpretation of their collective bargaining agreement," *ibid.*, and that their "confidence in the arbitration process and an arbitrator's presumed special competence in matters concerning bargaining agreements does not terminate with the contract." *Id.* at 254. Finally, the court found it "noteworthy that the parties drafted their broad arbitration clause against a backdrop of well-established federal labor policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective-bargaining agreements." *Ibid.*

Just as this Court considered the nature of the arbitration clause in *Nolde* in determining that creation of a presumption of post-contract arbitrability was warranted, the Third Circuit should have considered the nature of the Pension and Disability Agreement arbitration clause in determining whether that presumption was applicable herein. *Nolde* does not create an always applicable, always controlling rule of post-contract arbitrability. Rather, it declares a presumption based upon a foundation of indicia of the parties' intent and policy considerations. When that foundation is lacking, the presumption simply cannot be applied; if it is, as it was here by the court of appeals, it is transformed into an irrebutable presumption of arbitrability of all post-contract disputes.

II.

THE THIRD CIRCUIT'S CONFIRMATION OF THE ARBITRATOR'S AWARD ON THE MERITS PRESENTS IMPORTANT QUESTIONS AS TO THE PROPER SCOPE OF JUDICIAL REVIEW OF ARBITRATION AWARDS WHICH SHOULD BE SETTLED BY THIS COURT.

The proper standard of judicial review of arbitration awards was last considered in depth by this Court in its 1960 decisions in the *Steelworkers' Trilogy*, *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). From those cases, a series of

rubrics has developed: An arbitration award must "draw its essence" from the collective bargaining agreement, but an award may not be vacated unless it is in no rational way derived from the collective bargaining agreement; an arbitrator is not free to "dispense his own brand of industrial justice," yet he need not give any rationale or justification for his decision.

Although these phrases are routinely repeated by the courts, they have not produced a consistent body of case law.[13] More significantly, petitioners submit, they are being applied in a manner unanticipated and unintended by this Court.

In *United Steelworkers of America v. Enterprise Wheel & Car Corp., supra,* this Court, noting the presumed expertise of arbitrators in interpreting labor agreements, held that an arbitration award interpreting a collective bargaining agreement may not be vacated solely because the reviewing court disagrees with its interpretation.[14] The Court also made clear, however, that an award which is not based on contract interpretation and application must be vacated. The arbitrator may look to the law, but only as an aid in interpreting the contract. 363 U.S. at 597-98. He may consider the practical ramifications of his decision, but only to the extent the contract allows him to do so. *United Steelworkers of America v. Warrior & Gulf Navigation Co., supra,* 363 U.S. at 582. In short, the collective bargaining agreement—the agreement of

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13 The Third Circuit itself noted, in *Ludwig Honold Mfg. Co. v. Fletcher,* 405 F.2d 1123, 1126 (3d Cir. 1969): "Although language (of *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)) setting forth these guidelines was precise and uncomplicated, one problem has emanated from the cases which have followed *Enterprise:* that of formulating a consistent and workable standard to be utilized by the courts in exercising the function of review. Circuit and District Court decisions have not exuded uniformity in translating the 'essence' test into a pronouncement of the appropriate extent or limitation of judicial review of the arbitrator's interpretation."

14 The Court held: "The Court of Appeals' opinion refusing to enforce the reinstatement and partial back pay portions of the award was not based upon any finding that the arbitrator did not premise his award on his construction of the contract. It merely disagreed with the arbitrator's construction of it." 363 U.S. at 598.

the parties to the arbitration—should define and limit the arbitrator's actions.

The Third Circuit, however, in purported reliance on the *Steelworkers' Trilogy* rubrics, has taken a different course in *United Steelworkers of America, et al. v. American Smelting and Refining, et al.* It, in contrast to this Court in *United Steelworkers of America v. Enterprise Wheel & Car Corp., supra,* does not require an arbitrator to engage in contract interpretation. In *Ludwig Honold Mfg. Co. v. Fletcher,* 405 F.2d 1123, 1128 (3d Cir. 1969), the court held that an award must be confirmed "if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intent." Herein, the panel majority extends that rule a step further. It implicitly holds that an arbitrator may base his award on his perception of the law, on his perception of equity, or, indeed, on whatever he chooses, so long as a reviewing court may later find a way, however strained or attenuated, of connecting it to the agreement. That this is in fact the rule adopted by the court of appeals is made clear by comparison of the opinions of the arbitrator, the panel majority, and the dissent.

The arbitrator in this case was called upon to determine whether employees terminated as a result of the FMC plant closing are entitled to security and severance pay under the terms of the ASARCO Agreement which had terminated six and one-half months earlier. That Agreement provided for payment of benefits to a limited class of employees:

> PAYMENTS:
>
> Laid off Employees (for lack of work only)
>
> * * * *
>
> Employees separated for any reason other than lay-off, retirement, permanent and total disability or death shall not receive any payments. (Appendix L at 89-90)

Thus, the arbitrator faced two questions of contract construction. First, whether the employees terminated in connection with the strike-induced plant closing were "laid-off for

lack of work;" and second, if the employees were laid-off for lack of work, whether the contract term under which they claimed benefits was still in effect six and one-half months after contract expiration when their employment was terminated.

However, the arbitrator never addressed these questions, or analyzed the contract terms. Although impliedly conceding that the plant-closing employment terminations were not due to a lack of work, as the ASARCO Agreement required they be if severance pay were to be due, he held that it would be unfair to consider the fact that the employees' strike had precipitated the closing and their terminations:

> [I]n the instant matter, the employees were *not* at work, presumably would not have accepted work even if made available unless a new contract with acceptable terms had been agreed upon and hence may be deemed to have contributed to or shared in some of the responsibility for the plant closing.
>
> However, as the strike and plant closing were both apparently lawful economic actions, I conclude that it would be wrong if in this proceeding either side gained a benefit or suffered some prejudice by those actions. Hence I shall not deem them determinative or even probative. (Appendix K at 83)

Having thus eliminated the reason for the FMC plant closing from consideration, the arbitrator found that closing (resulting from a more than six-month long strike) to be similar to ASARCO's closing of its refinery in 1977 (a management decision during the term of an effective contract unrelated to any union activities). Since ASARCO paid security and severance pay at that time, the arbitrator reasoned, it was only fair that FMC be required to do the same under the entirely different circumstances before him (Appendix K at 83-84). No further discussion of the contract was included, nor mention made of the fact that the ASARCO plant closing was during the term of an effective agreement, while the FMC plant closing before him was six and one-half months after contract termination. Petitioners submit that the arbitrator's unex-

plained failure to discuss this distinction and the question of survivability of substantive terms was due to an erroneous conclusion by him that this Court's decision in *Nolde* mandates survival of all contract provisions. The arbitrator discussed *Nolde* at the start of his opinion, stating that, despite his personal reservations about the decision, he could not substitute his judgment for that of the *Nolde* Court. Thus he concluded, although the forum for arbitration herein—a rotating panel of arbitrators—had ceased to exist at contract termination, *Nolde* nonetheless mandated post-contract arbitration. After reaching that conclusion, the arbitrator did not further discuss survivability, apparently assuming that *Nolde* also mandates survival of substantive contract rights. There is no other logical explanation for his failure to even note that he was granting rights after contract expiration with respect to events occurring after contract termination.[15]

In short, the arbitrator never reached the *contract* issues submitted to him, due to his own conception that consideration of the cause of the terminations, although determinative under the contract, would be inequitable, and his conclusion that *Nolde* had decided the question of substantive survivability for him.

The Third Circuit panel majority, although noting that petitioners had presented "forceful arguments as a matter of contract interpretation," confirmed the arbitration award (Appendix A at 11). It was not free, the majority stated, to vacate the award unless it was "not in any rational way derived from the collective bargaining agreement" (Appendix A at 11).

In applying this standard, the majority felt constrained to impute new reasoning to the arbitrator; to find a way of connecting his holding to the collective bargaining agreement. Thus, they focused on a passing comment in the arbitration award that both ASARCO and FMC "closed down for essentially economic reasons," a conclusion reached by the arbitrator only after he had eliminated the strike against FMC from consideration (Appendix K at 83). The majority, however,

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15 See discussion of Judge Rosenn's dissenting opinion, *infra*, at 26-27.

transformed this comment into a conclusion by the arbitrator that the contractual requirement of layoffs for lack of work means merely that there had to be separations—whether permanent or temporary—for economic—rather than disciplinary—reasons (Appendix A at 12-14).

The majority further strained in concluding that the arbitrator did not exceed his powers in refusing to consider the strike. Since he had already determined that layoff for lack of work meant separation for economic reasons, the majority held, the fact that the terminations at issue resulted from the strike was irrelevant (Appendix A at 13-14). Again, however, this is reasoning of the Third Circuit panel majority, not that of the arbitrator. The arbitrator did not exclude consideration of the strike because he found layoff for lack of work to mean separation for economic reasons. He never made that contract interpretation, and his exclusion of the strike was the basis—rather than the result—of his conclusion that the ASARCO and FMC closings were similar.

Finally, the majority endorsed that arbitrator's failure to address the question of survival of the contract's substantive terms on the ground that FMC's argument on this point in arbitration was not clear enough, because an arbitrator has no duty to discuss all issues or give the reasons for his decision, and because the parties *"could have"* agreed to have benefits accrue after contract termination (Appendix A at 15). The majority did not, however, consider whether the contract here in any way supported the conclusion that the parties *did* agree to have benefits accrue after contract termination. In short, as to the survivability issue, neither the arbitrator nor the panel majority examined the parties' agreement. As to whether the contractual prerequisites to security and severance pay had been met, the arbitrator excluded those requirements from consideration on the ground of equity, and the majority sanctioned that exclusion on the ground that had the arbitrator engaged in contract interpretation, he could have so found.

Petitioners submit that this view of the scope of arbitration is an erroneous one, unjustified by this Court's earlier decisions. Clearly, those decisions were intended to favor the finality of arbitration awards, but, it is submitted, they were

not intended to uphold decisions patently based on improper considerations on the ground that, by strained logic, the arbitrator could have reached the same conclusion had he properly confined himself to contract interpretation.

Petitioners further submit that the reasoning of Judge Rosenn, dissenting with respect to the security and severance pay award, shows the proper course for determining whether an arbitration award is rationally related to a collective bargaining agreement. Judge Rosenn, in stark contrast to the panel majority, did not feel constrained to seek out a basis for the arbitrator's conclusions; rather, he examined the arbitrator's opinion as written and the collective bargaining contract as agreed upon, and determined that the former did not reasonably relate to the latter.

Judge Rosenn first noted that the arbitrator's primary task was to interpret the collective bargaining agreement; that he may bring his informed judgment to the matter and look to other sources for guidance, but that "he is not free to romp wherever his fantasies take him in ascertaining the intentions of the parties" (Appendix A at 20). Thus, Judge Rosenn examined the questions raised by the security and severance pay provisions of the contract and the arbitrator's holdings or lack of holdings thereon.

He first registered strong criticism of the arbitrator's implied holding that the FMC plant closing constituted lack of work, noting the Union's admission in arbitration that, had the workers ended their strike, the plant had orders to fill and work available (Appendix A at 22-23). Since the ASARCO Agreement made the reason for separation determinative of eligibility for benefits, Judge Rosenn reasoned, the arbitrator was not free to disregard the fact that the plant closing and terminations resulted from the strike. The arbitrator's decision to do so—on the basis of his own concepts of fairness—was, Judge Rosenn concluded, a "clear example of an arbitrator 'dispensing his own brand of industrial justice' " (Appendix A at 23).

Judge Rosenn further disagreed with the majority's conclusion that the arbitrator could have rationally concluded the terminated employees were laid-off. Both the collective bar-

gaining agreement and the common meaning of layoff[16] indicate that it is temporary suspension with the possibility of recall, he noted, yet the arbitrator engaged in no analysis of the term or the parties' intent in using that term. The arbitrator is not free, Judge Rosenn stated, to disregard these clear contract terms in favor of reliance on the "precedent" of actions taken by ASARCO under totally different circumstances for unspecified reasons (Appendix A at 26-27).

Judge Rosenn finally concluded that the arbitrator could not have found the employees entitled to security pay because that is a benefit earned, if at all, at the time of layoff, and the collective bargaining agreement creating this right simply was not in effect at the time of the plant closing (Appendix A at 28). That the arbitrator did not address this question in his award does not, Judge Rosenn stated, insulate it from review as the panel majority suggest, for there is no indication in either the arbitrator's award or his questions to counsel at the arbitration hearing that he even considered the expiration issue in connection with survival of the substantive contract terms. The arbitrator apparently erred, Judge Rosenn's dissent suggests, in applying the *Nolde* presumption of survivability of arbitration duties to survivability of terms conferring new substantive rights:

> The two issues are distinct and are controlled by different principles. *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977) created a presumption of survivability for arbitration

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16 In *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 286-87 (1946), this court stated: "Discharge normally means termination of the employment relationship or loss of a position. In common parlance and in industrial parlance a person who has been laid off by operation of a seniority system and put on a waiting list for reassignment would hardly be considered as having been 'discharged' . . . A furlough is not considered a discharge. It is a form of layoff. So is a leave of absence . . . An employee on furlough or on leave of absence has a continuing relationship with the employer; he retains a right to be restored to work under specified conditions." *See also CBS, Inc. v. Photographers, Local 644*, 86 CCH Lab. Cas. ¶ 11,516 at 22,021 (2d Cir. 1979) ("lay-off" refers only to separations which are expected to be temporary).

> clauses because such a rule significantly advances an important federal labor policy . . . . No such presumption applies to Article XV. Whether the substantive provisions of that Article survived contract termination depends solely upon the parties' intentions and whether they are expressed in the contract. Had the arbitrator considered the issue of survivability in the context of the benefits provisions, as he did in connection with the issue of arbitrability, he would have found nothing whatever in the terms of the contract that showed the parties intended continuation of security pay after the termination of the contract. (Appendix A at 28).

Petitioners respectfully submit that the panel majority opinion, according an "exalted status"[17] to arbitrators, deferring almost absolutely to their judgment not only as to interpretation of the contract, but also so to whether the contract terms should even be applied, conflicts with this Court's holding in *United Steelworkers of America v. Enterprise Wheel & Car Corp., supra,* and renders the actual agreements of labor and management virtually meaningless. Petitioners further submit that the decisions herein are illustrative of serious inconsistencies among the lower courts, raising important questions as to the scope of judicial review of arbitration awards which warrant consideration by this Court:

First, does "rationally related to the collective bargaining agreement" mean, as the Third Circuit majority suggest, susceptible to relation through revised and strained reason; or, as petitioners contend, and the dissent would have it, does rational relationship require a logical interpretation of contract terms?[18]

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17 *See Ludwig Honold Mfg. Co. v. Fletcher,* 405 F.2d 1123, 1126 (3d Cir. 1969).

18 *Compare Campo v. Local Lodge No. 1926, Int'l Ass'n of Machinists & Aerospace Workers,* 535 F.2d 330 (10th Cir. 1976) (arbitrator must limit himself to contract and reason from factual findings to conclusion), with *H.K. Porter Co. v. United Saw, Tile & Steel Products Workers,* 333 F.2d 596, 602 (3d Cir. 1964) (award vacated when the arbitrator had no ground upon which to base his interpreta-

Second, to what extent may an arbitration award rely on outside circumstances, or the arbitrator's perception of the law,[19] and still draw its essence from the collective bargaining agreement? May an arbitrator who, like the arbitrator herein, feels that application of a contract term would be unfair, ignore that term?[20]

Petitioners respectfully submit that the prior decisions of this Court require the conclusion that the proper standard of review of arbitration awards requires a logical interpretation of contract terms, not the arbitrator's perception of the law or his subjective view of equity, and that, therefore, this Court should grant this petition and reverse the judgment of the Third Circuit herein.

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tion) and *Ludwig Honold Mfg. Co. v. Fletcher,* 405 F.2d 1123 (3d Cir. 1969) (an award is valid unless it can in no rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intent).

19 *See United Steelworkers of America v. Enterprise Wheel & Car Corp., supra,* 363 U.S. 593 at 597.

20 *Compare F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local No. 781,* 629 F.2d 1204 (7th Cir. 1980), *cert. denied,* 68 L.Ed.2d 324 (1981), with *Mistletoe Express Service v. Motor Expressmen's Union,* 566 F.2d 692 (10th Cir. 1977).

CONCLUSION

For the foregoing reasons, this Petition for Writs of Certiorari should be granted.

Respectfully submitted,

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Dated: July 27, 1981

Appendix

81-1771

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN SMELTING AND REFINING COMPANY AND FEDERATED METALS COMPANY, corporations authorized to do business in the State of New Jersey,

Petitioners,

—vs.—

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and its LOCAL UNION, No. 365, Labor Organizations,

Respondents.

APPENDIX TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1587

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and its Local, PERTH AMBOY SMELTER AND REFINERY WORKERS UNION NO. 365, both an unincorporated organization of more than 7 persons

—v.—

AMERICAN SMELTING AND REFINING COMPANY and FEDERATED METALS COMPANY, corporations authorized to do business in the State of New Jersey,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Civ. No. 79-1531)

Argued January 13, 1981

Before: SEITZ, *Chief Judge,*
ROSENN and SLOVITER, *Circuit Judges*

(Filed April 28, 1981)

EDWARD F. RYAN (Argued), LAURENCE REICH, ROSEMARY ALITO HALL, *Carpenter, Bennett & Morrissey, 744 Broad Street, Newark, N.J. 07102, Counsel for Appellants.*

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OPINION OF THE COURT

SEITZ, *Chief Judge.*

Federated Metals Corporation appeals from an order of the district court ordering enforcement of the arbitration award on the motion of the United Steelworkers of America (the Union) for summary judgment

I.

The labor dispute and eventual plant shutdown involved in this case are detailed in *Federated Metals Corp. v. United Steelworkers,* Nos. 80-1606, -1607 (3d Cir. DATE), which we also decided today. To summarize

briefly, when Federated Metals, a subsidiary of American Smelting & Refining Company (ASARCO), acquired ASARCO's plant at Perth Amboy, New Jersey, it assumed the collective bargaining agreement entered into between ASARCO and the Union.[1] This collective bargaining agreement was to expire on June 30, 1977. When the Union and Federated Metals failed to reach agreement on a new collective bargaining agreement by this date, the Union commenced an economic strike. After several months of unsuccessful negotiations, Federated Metals decided to close the plant. Federated Metals publicly announced this decision on January 11, 1978.

On January 19, 1978, the Union submitted to Federated Metals a claim for security and severance pay that it alleged was due the employees under the expired collective bargaining agreement.[2]

Federated Metals denied the Union's claim. According to Federated Metals, it was not obligated to honor these claims because the collective bargaining agreement on which they were based had expired. Alternatively, Federa-

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1 ASARCO was made a party to this action solely because it owns Federated Metals. It was eliminated from the arbitration proceeding by stipulation of the parties.

2 The security and severance pay provision provides:

ELIGIBLE

All employees upon completion of Two (2) Years Service. (All "Years Service" shall be based on the Plant's Seniority Lists).

PAYMENTS

Laid-off Employees (for lack of work only): After 14 calendar days on lay-off, $50.00/week until either:

(a) Employee is recalled.
(b) Exhaustion of his amount accrued by Formula; . . .
(c) Fifty-two weeks.
whichever first occurs.

(Emphasis in original).

ted Metals contended that the employees were not entitled to security and severance pay because they had not been laid off for lack of work.

The Union demanded arbitration. It based this demand upon the broad arbitration clause in the collective bargaining agreement, which provides:

> A grievance is defined to be any controversy between the parties or between the Company and employees covered by this Agreement, (1) as to any matter relating to working conditions or wage rates not specifically covered by this Agreement; and (2) any matter involving the interpretation, application or violation of any provision of this Agreement.

Federated Metals refused to submit to arbitration because it believed that its duty to arbitrate did not survive the termination of the collective bargaining agreement. In support of this position, Federated Metals emphasized that when the parties had agreed to a permanent panel of five named arbitrators, they had stipulated in certain preliminary documents that "[t]hese arbitrators and this procedure shall continue for the term of the agreement, expiring June 30, 1977."[3]

The Union then sought to compel arbitration in a New Jersey state court. Federated Metals removed the pro-

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3 The collective bargaining agreement itself does not contain a limitation on the terms of the arbitrators. It merely provides:

> In the event that any such grievance, dispute or controversy shall not be settled in the manner provided above, either party may . . . request that it be submitted to arbitration before a single arbitrator selected from the panel listed below:
>
> [Then followed a list of five names]
>
> These arbitrators shall be selected in rotation. If the Arbitrator selected is then unavailable within sixty (60) days, or declines to serve, the next Arbitrator shall be selected.

ceeding to the United States District Court for the district of New Jersey. On July 18, 1978, the district court ordered that the question of arbitrability of the dispute over security and severance pay, as well as the merits of the dispute if it was found to be arbitrable, be submitted to an arbitrator.

Both parties agreed on an arbitrator. The arbitrator found that the security and severance pay dispute was arbitrable. Further, he found that Federated Metals owed security and severance pay to the employees under the expired agreement.

The Union filed suit in federal district court to enforce the arbitration award. Federated Metals counterclaimed to vacate the award. On the Union's motion for summary judgment, the district court ordered that the arbitration award be enforced.

II.

We first address the Union's argument that Federated Metals' failure to appeal the July 18, 1978 order of the district court compelling arbitration of both the question of arbitrability and the underlying dispute precludes it from challenging the arbitrator's finding that the dispute was arbitrable. The district court order was a final order within the meaning of 28 U.S.C. § 1291 (1976), *see, e.g., Goodall-Sanford, Inc. v. United Textile Workers, Local 1802,* 353 U.S. 550, 551-52 (1957), which Federated Metals chose not to appeal.

We believe that the failure to appeal the July 18 order only precludes Federated Metals from challenging the district court's decision that the question of arbitrability was for the arbitrator. It does not foreclose Federated Metals' challenges to the arbitrator's rulings that the

dispute was arbitrable and that Federated Metals was obligated to give the employees the security and severance pay. We recognize that a challenge to the July 18 order might have presented some issues similar to those raised by Federated Metals in this case. However, we believe that in this situation an order that the question of arbitrability is for the arbitrator is distinct from a decision that the underlying dispute is arbitrable. Thus, the failure to appeal the former does not foreclose a challenge to the latter.

III.

Federated Metals argues that the arbitrator's decision that the dispute was arbitrable should be vacated because the Union did not assert the claim to security and severance pay within a reasonable time after the agreement had expired and because the arbitrator ignored the intent of the parties. When reviewing an arbitrator's ruling that a particular dispute is arbitrable, a court's role is even more circumscribed than it is when a court decides in the first instance whether a dispute is arbitrable, *see, e.g., United Steelworkers v. Warrior & Gulf Navigation Corp.*, 363 U.S. 574, 582-83 (1960) (describing the court's role in determining questions of arbitrability). This is so because "the parties [have] excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator." *Id.* at 583 n.7.[4]

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4 As we noted *supra*, Federated Metals' failure to appeal the July 18 order precludes it from challenging that court's determination that the parties clearly demonstrated their agreement to have an arbitrator decide the question of arbitrability.

By committing the decision on arbitrability to the arbitrator, the parties have expressed their desire that the arbitrator use his or her knowledge of the "common law of the shop" and his or her personal judgment to consider criteria not expressly in the contract when deciding not only the merits of the dispute but also the question of arbitrability. *Cf. United Steelworkers v. Warrior & Gulf Navigation Corp.*, 363 U.S. at 581-82 (delineating why parties prefer to commit disputes to an arbitrator). When the parties have committed questions of arbitrability to the arbitrator, the arbitrator's determination that a dispute is arbitrable under the arbitration clause of the contract may involve consideration of much the same factors as his or her interpretation of the contract provision that governs the merits of the dispute. Therefore, we review the arbitrator's decisions as to both arbitrability and the merits of the dispute by the same standard. We will not vacate the arbitration award unless it cannot in any rational way be derived from the collective bargaining agreement. *See, e.g., Ludwig Honald Manufacturing Co. v. Fletcher,* 405 F.2d 1123, 1128 (3d Cir. 1969).

We do not find persuasive Federated Metals' argument that this claim was untimely. Although the arbitrator did not specifically address this issue in his opinion, the district court found that there was no unreasonable delay. This claim arose when Federated Metals announced its decision to close the plant, and the Union filed its claim only eight days later. Under the circumstances of this case, we do not believe there was unreasonable delay. *See e.g., Federated Metals Corp. v. United Steelworkers,* Nos. 80-1606, -1607 (3d Cir. DATE); *United Steelworkers v. Fort Pitt Steel Casting,* 635 F.2d 1071 (3d Cir. 1980), *petition for cert. filed,* 49 U.S.L.W. 3727 (U.S. March 16, 1981) (No. 80-1564) (*Fort Pitt II*).

Federated Metals advances two arguments to support its contention that the arbitrator's decision ignored the intent of the parties. First, it argues that the arbitrator exceeded his authority when he relied on *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers,* 430 U.S. 243 (1977); to reach his decision.

If Federated Metals is arguing that the arbitrator erred in considering *Nolde* at all, we do not accept this argument. As long as an arbitration award "draws its essence from the collective bargaining agreement," the arbitrator may look to sources other than the collective bargaining agreement for guidance in making that award. *See, e.g., United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 596-97 (1960). When deciding the arbitrability of a particular dispute, we believe that it is permissible for an arbitrator to look to the decisions of the United States Supreme Court discussing how courts should decide questions of arbitrability, particularly because the question of arbitrability is generally one that a court decides. Thus, the fact that the arbitrator relied on *Nolde* does not invalidate his decision.

On the other hand, Federated Metals may be arguing that the arbitrator completely ignored the intent of the parties because he incorrectly interpreted *Nolde* as establishing a conclusive presumption of postcontract arbitrability. We do not believe that this is a fair reading of the arbitrator's opinion. Moreover, even if we assume that such a reading of his opinion is plausible, this is not a sufficient ground for vacating his award if there are other plausible readings. When confronted with a similar contention, the *Enterprise Wheel* Court stated: "A mere ambiguity in the [arbitrator's] opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for

refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award." 363 U.S. at 598. In this case, it is at least plausible to read the arbitrator's opinion as merely looking to *Nolde* as an appropriate guide to assist him in ascertaining the parties' intent and not as establishing a per se rule that the arbitration clause survives contract termination. Thus, we will not vacate the award on this ground.

Second, Federated Metals argues that because the parties agreed that their method of selecting an arbitrator would terminate when the collective bargaining agreement expired, they necessarily intended that the duty to arbitrate would also terminate at that time. Although the parties did not include a time limitation in the collective bargaining agreement itself, *see* note 3, *supra,* in preliminary memoranda and in certain statements made to the employees, they indicated that this procedure would only continue until the collective bargaining agreement expired. Federated Metals argues that if the *method* of arbitration terminates when the collective bargaining agreement expires, the agreement to arbitrate necessarily terminates also, because arbitration is nothing more than a *method* of settling disputes.

Although this is certainly one plausible interpretation of the parties' intent, it does not necessarily demonstrate that the arbitrator's determination that the duty to arbitrate survived contract termination was irrational. In answering this contention of Federated Metals, the arbitrator's opinion appears to be somewhat ambiguous. On the one hand, the arbitrator explicitly rejects the notion that the "bare use of named arbitrators" operated to exclude postexpiration disputes from arbitration, thus indicating that he believed there was no durational limit on even the method of selecting an arbitrator. This in-

terpretation is rationally derived from the collective bargaining agreement because the arbitrator could have found that the failure to include the durational limitation in the arbitration clause of the collective bargaining agreement indicated that the parties did not intend this limitation to be part of their final, integrated agreement.

On the other hand, the arbitrator also draws a clear distinction between the obligation to arbitrate a dispute and the identity of or the method of selecting an arbitrator. The Union argues that when the parties agreed to this method of selecting arbitrators, they took pains to ensure that they could either replace the named arbitrators or change the method of selection when it was time to negotiate a new agreement. The Union maintains that the parties took these steps because they did not want to be eternally bou[illegible] to the same five men. This is a plausible reading of th[illegible] parties' intent. Because the arbitration clause provided no basis for excluding postexpiration disputes before the parties changed the method of selecting arbitrators, the arbitrator rationally could have concluded that the parties did not intend to achieve a different result when they adopted the use of a permanent panel.

We believe that either of the possible interpretations of the arbitrator's opinion is rationally derived from the arbitration clause of the collective bargaining agreement. Therefore, we will not vacate the award on the ground that the dispute was nonarbitrable.

IV.

Federated Metals also advances several reasons why the arbitrator exceeded his authority when he found that Federated Metals owed the employees security and sever-

ance pay. Federated Metals argues that the arbitrator added to the agreement by awarding the security and severance pay because the agreement only provides for such pay when employees are laid off for lack of work.[5] It argues that a plant shut down is not a layoff. Further, it contends that the plant closed either because of the strike or because the parties could not agree to a collective bargaining agreement, not because there was a lack of work.

Although these are forceful arguments as a matter of contract interpretation, courts are not free to refuse to vacate arbitration awards merely because they might have interpreted the contract differently were it up to them in the first instance. We will not vacate the arbitration award unless Federated Metals demonstrates that it is not in any rational way derived from the collective bargaining agreement.

The arbitrator first looked to other arbitration decisions interpreting the term "layoff" to determine whether "layoff" embraces permanent severance when the plant closes. He found that the question was not settled, so he looked for more direct evidence of the parties' intent. He considered the conduct of ASARCO, who had negotiated the collective bargaining agreement, when it closed the major portion of its Perth Amboy facility.[6] The arbitrator reasoned:

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5 The security and severance pay provision is detailed in note 2, *supra*.

6 Federated Metals also asserts that the arbitrator exceeded his authority by considering the conduct of ASARCO at all in making his decision. However, as we noted earlier, the arbitrator may look to sources other than the collective bargaining agreement for guidance as long as the arbitration award "draws its essence from the collective bargaining agreement." *United Steelworkers v. Enterprise Wheel & Car Corp.* 363 U.S. 593, 596-97 (1960).

> To my mind what is significant is that under the same contract and same contract provision, Federated's parent, ASARCO some months earlier closed a large protion of its operation at this location, and made security and severance payments under Article XV of the contract to its employees whose jobs ended and who were not retained in employment for certain continuing operations by Federated. Because I do not find any significant difference between the plant closing of ASARCO and the later cessation of operations by Federated, I judge the application of Article XV of the contract by ASARCO to have a precedential effect on the closing of its subsidiary, Federated. I conclude that both closed down essentially for economic reasons; that the employees of both lost their jobs under similar conditions and that how ASARCO, under Article XV, treated those employees whose jobs ended is, both contractually and equitably the way Federated, who undisputedly assumed ASARCO's collective bargaining agreement with the Union covering the instant affected [employees,] should have treated its employees when it closed.

We do not believe that this reasoning exhibits a manifest disregard for the collective bargaining agreement. To the contrary, it appears that the arbitrator properly considered both existing arbitration decisions and the conduct of the parties to the agreement in a similar situation to ascertain the meaning of the contract language. It was rational to conclude that the parties intended that "layoff" would encompass the plant shutdown, as well as temporary layoffs, and that severance pay should be provided in both situations.

Further, we believe that the arbitrator's ruling that the term "lack of work" covered the plant closing in this case was also rationally related to the collective bargaining agreement. In so ruling, the arbitrator compared the reasons for this closing with the reasons for ASARCO's closing of its facility. He reasoned that ASARCO shut down its operations for essentially economic reasons, which would not fit within Federated Metals' narrow interpretation of "lack of work" as meaning only low demand or lack of orders. It is a rational reading of the clause to determine that the parties intended to distinguish economic layoffs or terminations from those for disciplinary reasons, and to award severance pay for the former whether they be occasioned by low demand or high production costs.

Having concluded that the parties intended that "lack of work" would encompass all economic layoffs, the arbitrator then compared Federated Metals' closing with that of ASARCO. In so doing, he refused to accept Federated Metals argument that this situation was different from the ASARCO shutdown because the Union caused the shutdown by going on strike. Federated Metals asserts that the arbitrator's failure to consider the strike as the cause of the shutdown was in manifest disregard of the collective bargaining agreement. The arbitrator refused to consider the strike because he believed that both the Union's strike and Federated Metals' decision to shut down were lawful economic actions and that neither party should suffer prejudice or obtain benefit from these actions. Thus, he did "not deem them determinative or even probative."

We conclude that this decision was not in manifest disregard of the collective bargaining agreement. If the severance-pay provision is intended to encompass ter-

minations for economic reasons, as opposed to disciplinary reasons, this plant closing is covered. Presumably, Federated Metals closed the plant because it could not afford the Union's demands. High labor costs are economic reasons, and the fact that the employees engaged in a lawful strike in support of their bargaining position should not deprive them of a benefit to which they would otherwise be entitled.

Finally, Federated Metals argues that even if the employees were entitled to severance pay, they were not entitled to security pay. Thus, the arbitrator added to the agreement by awarding both. Federated Metals bases this argument on the fact that the security pay was nonaccruable, and therefore, unlike the accrued severance pay, the employees did not "earn" the security pay until they were terminated. Federated Metals reasons from this that the employees could not recover such pay, presumably as a matter of law.

At the outset, we note that this argument apparently was not presented to the arbitrator. The Union so states in its brief and we do not read Federated Metals' response as negating this contention. We have reviewed the transcript of the arbitration proceeding that was included in the record on appeal and we do not believe that Federated Metals can fairly be said to have advanced this argument as a separate contention. One of the primary purposes of arbitration is to settle labor disputes quickly and *finally*. Thus, we do not believe it appropriate for a party to argue that an arbitration award is irrational because it fails to consider an interpretation of the contract that they failed to unambiguously advance during the arbitration proceeding. *See generally Amalgamated Meat Cutters & Butcher Workmen v. Cross Brothers Meat Packers, Inc.*, 518 F.2d 1113, 1121 (3d Cir. 1975).

In any event, assuming that it is appropriate for us to consider this argument, we do not believe that it would warrant a district court's refusal to enforce the arbitration award. As we noted earlier, arbitrators have no obligation to state their reasons for an award. *See Enterprise Wheel,* 363 U.S. at 598. Therefore, we will enforce an arbitration award if it is rationally related to the collective bargaining agreement. We cannot say that the failure to separate security pay from severance pay was irrational. First, Article XV of the collective bargaining agreement does not explicitly segregate security pay from severance pay. Second, even though Federated Metals' interpretation of the security-and-severance-pay provision, which is persuasively developed in the dissent, is not unreasonable, it does not follow that the arbitration award is irrational. We believe that whether the parties intended to allow the accrual of benefits after termination is a matter of contract interpretation, which in this case was to be decided by the arbitrator, and such accrual, in our view, is not foreclosed as a matter of law. *See, e.g., Federated Metals Corp. v. United Steelworkers,* Nos. 80-1606, -1607 (3d Cir. DATE) and cases cited therein.

We conclude that Federated Metals has not demonstrated that the arbitrator's decision was not rationally related to the agreement. Therefore, we will not vacate the arbitration award.

V.

We find that Federated Metals is not precluded from challenging the rulings of the arbitrator on both arbitrability and the merits of the dispute. Further, we conclude that the district court was correct in rejecting Federated Metals' contention that the dispute was nonarbitrable.

Finally, we uphold the district court's conclusion that the arbitration award of security and severance pay draws its essence from the collective bargaining agreement, and thus should not be vacated.

VI.

The order of the district court ordering enforcement of the arbitration award will be affirmed.

ROSENN, *Circuit Judge,* Dissenting.

I agree with the majority that the question of arbitrability is for the arbitrator and that the disputes are arbitrable. However, I perceive no rational basis for the arbitrator's award of benefits to employees who were permanently terminated, rather than laid off, more than six months after expiration of the contract from which those benefits are alleged to flow. I therefore dissent from that portion of the majority opinion holding that the arbitration award draws its essence from the collective bargaining agreement and should be enforced.

I.

The Union and Employer entered into a collective bargaining agreement which terminated on June 30, 1977. Article XV of that agreement established a "Security and Severance Plan" which provided for payments to employees separated from employment due to layoffs for lack of work, retirement, permanent and total disability, or death. Article XV provides:

Article XV: Security and Severance Plan

Effective July 1, 1974:

FORMULA:

1% of Average Annual Earnings times Years of Service, plus $30.00 times Years of Service (*Annual Earnings:* Straight time hourly earnings, which shall exclude *all* pay premiums of whatever nature, for the twelve consecutive calendar months immediately preceding date of lay-off, retirement, or death, divided by the straight time hours worked, multiplied by 2,080 hours.

ELIGIBLE:

All employees upon completion of Two (2) Years Service. (All "Years Service" shall be based on the Plant's Seniority Lists).

PAYMENTS:

Laid-Off Employees (for lack of work only): After 14 calendar days on layoff, $50.00/week until either:

(a) Employee is recalled.

(b) Exhaustion of his amount accrued by Formula; provided, however, that the first twelve (12) weekly payments (if the employee is laid off that long) shall not be deducted from his amount accrued by Formula nor for those weeks for which the employee received State Unemployment Compensation.

(c) 52 weeks,

whichever first occurs.

In the event of (c) and an amount accrued remains, the employee shall have the option of: the remaining amount continuing on accrual; *or* re-

ceiving the remaining amount accrued in a lump sum payment.

Payments shall be made without regard to:

(1) Any other benefit or payment received by the employee.
(2) His employment status *except* as covered in (a) above.

An employee laid-off, recalled before (b) occurs and subsequently laid off, shall have an accrued amount based on total years of service (figured to nearest complete calendar quarter) *less total* deducted payments received.

Pensioned Employees: At date of retirement under Company's Retirement Plan, or on the date of his established eligibility for benefits under the Company's Plan of Permanent and Total Disability Benefits, the employee shall have the amount accrued by Formula less total payment received, if any. Retirement benefits shall reflect only laid-off benefit payments deducted; however, the first twelve (12) weekly payments (if the employee is laid-off that long) shall not be deducted from his amount accrued by the Formula nor for those weeks for which the employee received State Unemployment Compensation.

Death of an Employee: Upon the death of an employee his designated beneficiary shall receive an amount determined by Formula based on the employee's status at date of death. . . .

Employees separated for any reason other than lay-off, retirement, permanent and total disability or death shall not receive any payments.

After the plant closed in January 1978, following a six month strike, the Union filed a request with the Company for benefits under this provision on behalf of approximately 94 employees. The request was denied and, after the various proceedings detailed in the majority opinion, the Union won an arbitrator's award, which was enforced by the district court. At no time did the Union offer any source for the employee's entitlement to these benefits other than the above-quoted Article XV of the contract. The Company's position throughout this dispute has been that the employees are not entitled to benefits because: (1) they were not laid off for lack of work, but instead had been permanently separated from employment due to the closure of the Perth Amboy plant, and (2) even if the employee's terminations could properly be classified as layoffs for lack of work, no right to security benefits ever arose because those "layoffs" did not occur until more than six months after the contract expired.

The arbitrator found that "the employees were not at work, presumably would not have accepted work even if made available unless a new contract with acceptable terms had been agreed upon and hence may be deemed to have contributed to or shared in some of the responsibility for the plant closing." Nonetheless, he directed payment of benefits under Article XV because:

(1) Having concluded that the strike and plant closing were both apparently lawful economic actions, he believed it would be improper if either side gained a benefit or suffered prejudice as a result.

(2) He found it *significant* that, under the terms of the same contract, Federated Metals' parent, ASARCO, had some months earlier closed a substantial part of its operations at Perth Amboy and had paid the benefits

described in Article XV to those employees whose jobs were terminated and who were not retained "for certain continuing operations by Federated." The arbitrator found "no siginificant difference" between the plant closing of ASARCO and that of Federated. He concluded that both operations were closed down essentially for economic reasons and that the employees of both had lost their jobs under similar conditions. Thus, he concluded that ASARCO's application of Article XV to the earlier closing had "precedential effect on the closing of its subsidiary, Federated."

Citing *Ludwig Honold Manufacturing Co. v. Fletcher,* 405 F.2d 1123 (3d Cir. 1969), the district court held that it could not say that the arbitrator's award was in no rational way derived from the agreement. The district court did not address Federated Metal's contention that the termination of employment due to permanent plant closure does not constitute a layoff for lack of work, the contractual prerequisite of invocation of Article XV. Nonetheless, it granted the plaintiff's motion for summary judgment and enforced the arbitrator's award. It denied the Company's motion for summary judgment.

II.

If these employees have a right to the benefits awarded by the arbitrator, it is undisputed that the right stems from Article XV. The interpretation of the article is for the arbitrator and he brings to the task his informed judgment. However, he is not free to romp wherever his fantasies take him in ascertaining the intentions of the parties. He is "confined to interpretation and application of the collective bargaining agreement; he does not sit to

dispense his own brand of industrial justice . . . [and] his award is legitimate only so long as it draws its essence from the collective bargaining agreement." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Of course, he may look to other sources for guidance, but unless the arbitrator manifests a fidelity to his obligation, a court must refuse to enforce the award. *Id. See Ludwig Honold Manufacturing Co. v. Fletcher,* 405 F.2d 1123, 1128 (3d Cir. 1969).

Article XV is a fairly complex contract provision and a failure to analyze carefully its intended manner of operation accounts for what is, in my view, the erroneous decision reached by the arbitrator and approved by the district court. I respectfully disagree with the majority when it states that "there is no separation of security pay from severance pay in the collective bargaining agreement." Although they are both treated in the same Article of the contract, the two types of benefits are different. The distinction to be drawn between the two is that severance pay is "earned" during the employee's length of service and security pay is not. *In re Public Ledger,* 161 F.2d 762, 773 (3d Cir. 1947).

Under Article XV, "severance pay" consists of a fund, the size of which is determined by use of the contractual formula in Article XV, which grows as an employee accumulates Years of Service. The article provides that an employee may draw upon his severance pay fund in only four situations. In the event of retirement, disability, or death, an employee may receive his severance pay fund in a lump amount. If an employee is laid off due to lack of work, he may draw weekly payments, in $50.00 increments, from his fund for those weeks in which he receives neither security pay, as described below, nor State Unemployment Compensation. No weekly payments may be

drawn, however, more than a year after the layoff occurred and, within that year, payments may not be drawn if the employee has been recalled to work.

Security pay, on the other hand, does not vary in amount or availability according to an employee's length of service. Any and all workers who meet the threshold requirement of two years' service (also required for severance pay) receive security pay in the event they are laid off due to lack of work. Security pay also takes the form of $50.00 weekly payments, but is made only during the twelve weeks of layoff following the initial waiting period, and in those weeks in which the employee is receiving State Unemployment Compensation.

No one contends that these employees retired, died, or were permanently and totally disabled. Thus, they were not entitled to any benefits under Article XV unless they were laid off for lack of work. The question before us, then, is whether the arbitrator's conclusion that these employees were laid off for lack of work is a rational application of the terms of the contract.

I first register my strong objection to the arbitrator's implied acceptance of the Union's argument that the closing of the plant constituted "lack of work" under the contract resulting in the employees' loss of jobs. This is mere sophistry, particularly on this record in which it is undisputed that, had the workers ended their strike, the plant had orders to fill and work available.[1] The arbitra-

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[1] At the arbitration hearing the following exchange took place between counsel for the parties:

MR. RYAN (Company counsel): Would you consider, Emil, that there was sufficient work at the Perth Amboy operation of the Rod and Tube and lead products, assuming we could have reached a satisfactory collective bargaining agreement?

MR. OXFELD (Union counsel): Sure, I will concede that. Of course. Sure there was work. As I said, in fact, I am sure there has

tor's conclusion that the employees should suffer no detriment as a result of their lawful economic action—the strike—is a clear example of an arbitrator "dispens[ing] his own brand of industrial justice." *United Steelworkers of America v. Enterprise Wheel & Car Corp., supra,* 363 U.S. at 597. The critical factor in resolving the case before him should have been what the parties intended when they agreed to include Article XV in their collective bargaining agreement. The arbitrator's decision shows no analysis of the pertinent contractual provisions. He is free to bring his special expertise to bear on the issues, but if his conclusion does not "draw its essence" from the contract, we cannot enforce his award. The Perth Amboy plant was closed because the Company could not reach an accord with the Union and that is why these employees lost their jobs. I have no hesitation in rejecting as not derived from the contract any conclusion of the arbitrator that interprets "laid off (for lack of work only)" to include permanent terminations of employment resulting from a strike-induced plant closing.

I also disagree with the conclusion of the majority that the arbitrator rationally concluded that these employees were "laid off." In industrial relations, "layoff" is commonly used to describe a temporary suspension of an employee's work that leaves the continuing employment relationship unaffected. *Fishgold v. Sullivan Drydock and Repair Corp.,* 328 U.S. 275, 287 (1946).[2] As the

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been work at all times in all the operations. Whether it was economically feasible is something we have no concern with because we don't participate in that judgment.

2 The Court in *Fishgold* quoted with approval the Oxford English Dictionary definition of layoff as "[a] period during which a workman is temporarily dismissed or allowed to leave his work; that part or season of the year during which activity in a particular business or game is partly or completely suspended; an off-season." 328 U.S. at 287 n. 11.

essence of Article XV discloses, "inherent in the term is the anticipation of recall." *CBS Inc. v. International Photographers of the Motion Picture Industry, Local 644,* 603 F.2d 1061, 1063 (2d Cir. 1979). In connection with Michigan's statutory unemployment compensation program, the Michigan Supreme Court has been called upon to define "layoff" and it too has iterated the essential element of temporary suspension of work or employment, not permanent separation. Thus, in *General Motors Corp. v. Erves,* 249 N.W.2d 41 (Mich. 1976), the court concluded that a layoff "is a temporary dismissal by the employer which anticipates reemployment and therefore is distinguished from unemployment by reason of discharge, resignation, or other *permanent termination.*" *Id.* at 46 (emphasis supplied). *Accord, Irwin v. Globe-Democrat Publishing Co.,* 368 S.W.2d 452, 455 (Mo. 1963).

There is a parallel between the case at bar and *Irwin v. Globe-Democrat Publishing Co., supra.* In *Irwin,* seventeen employees were awarded "dismissal pay" pursuant to a collective bargaining agreement between their union and the employer. During a strike by the St. Louis Newspaper Guild at its plant, the newspaper employer, the Globe-Democrat Publishing Co., sold all of its physical facilities to the St. Louis Post Dispatch and agreed to operate the plant for the latter upon the conclusion of the strike. Upon the termination of the strike plaintiffs offered to return to work but were advised that they were no longer employed by the Globe-Democrat. The plaintiffs contended they were entitled to "dismissal pay" under the collective bargaining agreement because there had been a layoff to reduce the work force. Like the Union in the case at bar, the plaintiffs in *Irwin* argued that the reduc-

tion in work force was necessitated by the newspaper's sale of the "the tools 'necessary to' . . . 'the printing of its newspaper.' " 368 S.W.2d at 454. The trial court agreed with this assessment.

On appeal, the Missouri Supreme Court observed that the term "layoff" had a well-defined meaning in the field of employment, that it did not mean termination of employment, but rather meant suspension of work or employment during a part or season of the year. It therefore held that an employee "laid off" did not have his employment status completely and finally terminated, that the termination of plaintiffs' employment was permanent and that therefore plaintiffs had been discharged. Accordingly, the court reversed the award of "dismissal pay."

Article XV itself clearly demonstrates that "layoff" was there used in the sense of a temporary separation from work. First, of course, the relevant provision of the Article anticipates a continuing relationship between the laid-off employee and the Company. Payments may be stretched out over the course of a year. Further, at the end of that year, the employee may leave funds "on accrual" with the Company, presumably to be later used in case of subsequent layoffs, or as severance pay should one of the three enumerated events come to pass. The provision also directs that payments should cease if the employee is recalled. Finally, even if the contractual language were to authorize a lump sum payment on permanent termination, the amount due the former employee under the "layoff" provision cannot be calculated until one year has passed. There is no way of knowing, at the time of separation, for how many of the coming weeks the employee will receive State Unemployment Compensa-

tion.[3] Yet for each of these weeks, a "laid off" employee is entitled to $50.00 without having it set off against the formula amount.

What the arbitrator had before him was a total and permanent severance of employment, squarely within the ambit of the contractual prohibition that employees separated "for any reason other than layoff, retirement, permanent and total disability or death shall not receive any payment." However, rather than analyze the contract to discover its intent, the arbitrator focused on the actions of ASARCO, Federated Metal's parent company, when it closed a portion of the Perth Amboy works earlier in 1977. He considered "significant" the fact that "under the same contract and identical contract provision," ASARCO made "security and severance payments" to those employees whose jobs ended and who were not retained in employment for certain continuing operations. Besides the obvious difference that the ASARCO contract was *in force* during the earlier closing of operations, which I shall discuss later, the arbitrator's reliance on the parent company's earlier action was improper. Although there was some evidence that the partial closure resulted from outmoded equipment and inadequate physical facilities, there is no indication that the affected employees were not actually placed on layoff status, subject to recall for the "continuing operations." Nor is there any indication in the record that whatever benefits were distributed by ASARCO flowed from Article XV. As I have shown, the layoff benefit provision of the Article does not pro-

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3 In recent years, Supplemental Unemployment Benefit (SUB) plans have become popular in the automobile and steel industries. They provide employer-financed benefits to supplement state unemployment insurance benefits and Article XV is a variation of a SUB plan. See BNA LRX 916.

vide for lump sum payments or, in fact, any payments until at least two weeks have passed. If immediate lump sum payments were made, it was in patent disregard of the contract. It may well be that any benefits made available flowed less from the contract than from other considerations not apparent on this record. A holding that once an employer, regardless of the reasons, gratuitously grants benefits not provided for by contract, he may not thereafter deny other workers those benefits, may reward some employees at the moment, but in the long run may seriously damage their cause.

III.

Perhaps even more disturbing than the arbitrator's conclusion that these employees were laid off for lack of work is his total lack of attention to the expiration of the collective bargaining agreement more than six months before the right to benefits allegedly accrued. Although the majority addresses this issue with the questionable statement that "whether the parties intended to allow the accrual of benefits after termination is a matter of contract interpretation, which in this case was to be decided by the arbitrator," maj. op., typescript at 13, I find it difficult to accept a conclusion that the arbitrator engaged in *any* contract interpretation to reach his result. Contract interpretation entails an analysis of language and a consideration of the circumstances under which an agreement was negotiated. Netither the arbitrator's award nor his questions to counsel at the arbitration hearing indicate any recognition of the expiration issue. Although he rightly concluded, after proper analysis, that the duty to arbitrate survived, his award gives no indication that he engaged in similar analysis of the survivability of

Article XV. The two issues are distinct and are controlled by different principles. *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union,* 430 U.S. 243 (1977) created a presumption of survivability for arbitration clauses because such a rule significantly advances an important federal labor policy. *See Steelworkers Trilogy,* 363 U.S. 564 (1960). No such presumption applies to Article XV. Whether the substantive provisions of that Article survived contract termination depends solely upon the parties' intentions and whether they are expressed in the contract. Had the arbitrator considered the issue of survivability in the context of the benefits provisions, as he did in connection with the issue of arbitrability, he would have found nothing whatever in the terms of the contract that showed the parties intended continuation of security pay after the termination of the contract.

The majority states that "whether the parties intended to allow the *accrual* of benefits after [contract] termination is a matter of contract interpretation, which in this case was to be decided by the arbitrator, and such *accrual,* in our view, is not foreclosed as a matter of law. *See, e.g., Federated Metals Corp. v. United Steelworkers,* Nos. 80-1606, -1607 (3d Cir. DATE) and cases cited therein." Maj. op., typescript at 13 (emphasis added). I am unable to agree that this is an accurate statement of the law or that the cases relied upon support it. According to Webster's Third New International Dictionary, at 13 (1966), the primary definition of "accrue" is "to come into existence as an enforceable claim: vest as a right. . . . " Thus, the majority would permit an expired contract to confer wholly new rights on parties long after the relationship created by the contract has been extinguished. I know no principle of contract law that supports such a result.

As I note in my concurrence in *Federated Metals,* the companion case on which the majority relies, the language to which this majority refers is dictum, because the court was not called upon to review the merits of the underlying pension and disability claims. Further, neither *United Steelworkers of America v. Fort Pitt Steel Casting,* 598 F.2d 1273 (3d Cir. 1979) nor *Local No. 595, International Association of Machinists v. Howe Sound Co.,* 350 F.2d 508 (3d Cir. 1965) lend credence to the majority's conclusion that rights may be accrued under an expired contract. In *Fort Pitt,* the company expressly obligated itself in the collective bargaining agreement to continue the employee's health insurance coverage after contract termination. 598 F.2d at 1276. The case actually dealt with a specific continuing obligation which, by its own express terms, survived expiration of the underlying contract. The parties presently before the court were aware of this alternative. In Article X, section 10(f) they made a similar provision for continued health insurance coverage in the event of a strike. No such provision was made for security benefits.

In *Howe Sound,* notwithstanding the court's inappropriate use of the term "accrue," 350 F.2d at 511, it is clear from reading the case that the rights to holiday and pro-rata vacation pay "accrued" during the term of the contract. The holiday pay was sought for Thanksgiving Day, November 22, 1962. The claimants were employees who had been terminated when the contract expired on October 30, 1962. They were entitled to holiday pay, however, because the contract provided that "[h]oliday pay shall be paid to employees . . . when such employee has worked within thirty (30) days of any such Holiday." 350 F.2d at 510 n.1. Thus, the workers' rights to holiday pay accrued under the contract on October 23, 1962—

during the life of the contract—even though the benefit was to be enjoyed after contract termination. Such a contractual arrangement is common and in accord with the law. *See John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 555 (1964).

In the district court the Company contended, as it does before this court, that security benefits are claimed on the assumption that there was a layoff in 1978 when the plant was closed and the employees were separated. At that time, the Company contends, the collective bargaining agreement was no longer in effect and there could be no entitlement under it to security pay. The district court found no merit in this contention on the ground, citing *Local 7-644, Oil, Chemical and Atomic Workers International Union v. Mobil Oil Co.,* 350 F.2d 708 (7th Cir. 1965), *cert. denied,* 382 U.S. 986 (1966), that a termination of the employer-employee relationship does not "vitiate the continued service of an employee."

The district court may be correct as an abstract matter of law, but the principle has no application to the facts of this case. The issue here is not whether an employee, who returns to work following an absence because of a strike, has suffered a break in service which adversely affects his seniority rights or accrued pension benefits. The question here is whether the opportunity to "earn" rights to benefits while on layoff, as distinguished from the right to enjoy benefits already earned and vested, survives contract termination. Inasmuch as that opportunity was purely a creation of the collective bargaining contract, it is extinguished when that contract ceases to be operative. On June 30, 1977, the collective bargaining agreement between these parties had conferred all the rights it was going to confer, imposed all the obligations it was going

to impose. Thus, as we observed in *Sun Oil Co. v. NLRB*, 576 F.2d 553, 558 (3d Cir. 1978):

> Except in limited circumstances not applicable here, *Nolde Brothers v. Bakery and Confectionery Workers Union*, 430 U.S. 243 (1977), an employer is not bound by the terms of a collective bargaining agreement once that agreement has terminated.

The issues in this case bear a remarkable similarity to those in *Owens v. Press Publishing Co.*, 20 N.J. 537, 120 A.2d 442 (1956). In *Owens*, the collective bargaining agreement established a right to severance pay when employees left the company for any reason other than gross misconduct. The amount of severance pay equalled one week's pay per six months of service. The collective bargaining agreement, containing the severance pay clause, expired by its terms on August 22, 1952. The claimants in the case were former company employees who had been separated from their jobs, for reasons other than gross misconduct, in the months of January, February and May of 1953. The claimants sought severance pay in an amount calculated using their entire length of service, *including those months after the contract had expired.*

The New Jersey Supreme Court held the former employees entitled to severance pay in amounts corresponding to their length of service as of August 22, 1952, when the collective bargaining agreement expired. In so holding, the court rejected the company's argument that the pay was not due unless the separations came during the life of the agreement:

> [T]he right of such pay can "arise" only during the subsistence of the contract so providing, and not

> after its termination; but once the right thus comes into being it will survive the termination of the agreement.

120 A.2d at 448. The court, however, also rejected the former workers' claims that they had earned severance benefits after August 22, 1952. The court noted that

> the right to separation pay was a creature of the collective bargaining agreement alone, a consensual undertaking limited to a fixed term; and it is fundamental in the law of contracts that upon the expiration of the period thus prescribed the agreement ceased to exist and its provisions has no *in futuro* force and effect.

Id. In the two quoted passages, the New Jersey court was announcing basic principles of law. Although *Owens* was not a review of an arbitration award, the principles of law set out above are of concern to us in determining whether the award presently before this court "drew its essence from the collective bargaining agreement." *See Ludwig Honold Manufacturing Co. v. Fletcher,* 405 F.2d 1123, 1128 (3d Cir. 1969). *See also International Union of United Brewery, Flour, Cereal, Soft Drink, and Distillery Workers of America v. Duke and Company, Inc.,* 373 F. Supp. 778 (W.D. Pa.), *aff'd,* 510 F.2d 969 (3d Cir. 1975) (rights and duties of parties arising out of employment relationship are strictly controlled by the terms of a collective bargaining agreement and duty to continue pension plan does not survive plant's closing); *Baker v. Fleet Maintenance Inc.,* 409 F.2d 551, 554 (7th Cir. 1969) (when collective bargaining agreement has expired by its

terms, it will not support claims for post-expiration wrongful discharge).[4]

In the case at bar, each employee, as he accumulated years of service, accrued a right under Article XV to receive severance pay if he retired, became disabled, or died. This also entitled him to have those same funds distributed in weekly payments in the event of layoff. The right to that benefit could accrue only during the contract's life and the right so accrued was limited. Article XV expressly conditioned its exercise on the occurrence of layoff, death, disability, or retirement. As pointed out in part II supra, I do not believe that any of these events occured and, thus, the condition precedent to these employees' exercise of their accrued rights has not been met.

Even assuming, however, that these employees could be considered to have been "laid off," and thus entitled to exercise their accrued rights to severance pay, they were not entitled to an award of security pay. Article XV provides no mechanism by which an employee can accrue rights to security benefits. Thus, security benefits are no more than an expectancy under the contract and may be exercised as a right only at the time when the employee is

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4 These same principles led court initially to reject claims that a duty to arbitrate disputes survived contract expiration. *See, e.g.*, Proctor & Gamble Ind. Union v. Proctor & Gamble Mfg. Co., 312 F.2d 181 (2d Cir. 1962), *cert. denied*, 347 U.S. 830 (1963). The Supreme Court has, of course, since identified an important federal labor policy that operates to create a presumption that the parties intended arbitration clauses to survive contract termination. Nolde Bros., Inc. v. Local 358, Bakery & Confectionery Workers Union, 430 U.S. 243 (1977).

The Union relies on *Nolde* in support of its claim that security pay survives contract termination. As pointed out in the text, *Nolde* relied heavily on the strong federal policy in favor of arbitration in extending the life of the contract clause at issue in that case. No such federal policy operates to presume the survivability of security pay clauses. *Nolde* is relevant only to the preliminary question of arbitrability, an issue on which we have unanimously found in favor of the Union.

laid off for lack of work. The events, therefore, that give rise to the right to security pay under Article XV must occur during the life of the contract. This requirement has not been met.

IV.

For the foregoing reasons, I conclude that the arbitrator's award does not draw its essence from the collective bargaining agreement. I further conclude that these employees were not laid off for lack of work and are therefore not entitled to the benefits awarded by the arbitrator. Alternatively, I conclude that even if they were laid off, the employees had no accrued or vested right to security pay. Thus, the award should not be enforced.

APPENDIX B

Order of the United States Court of Appeals Amending Slip Opinion, dated May 6, 1981

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 80-1587

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and its Local, PERTH AMBOY SMELTER AND REFINERY WORKERS UNION NO. 365, both an unincorporated organization of more than 7 persons

—v.—

AMERICAN SMELTING AND REFINING COMPANY and FEDERATED METALS COMPANY, corporations authorized to do business in the State of New Jersey,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civ. No. 79-1531)

Argued January 13, 1981

Before: SEITZ, *Chief Judge,*
ROSENN and SLOVITER, *Circuit Judges*

ORDER AMENDING SLIP OPINION

In the dissenting opinion, page 19, replace the second and third sentences of the second full paragraph with the following:

> Although it is true, as the majority asserts, that Article XV "does not explicitly segregate security pay from severance pay," maj. op., typescript at 13, I believe the two types of benefits are sufficiently dissimilar contractual concepts that they must be treated separately under the law.

By the Court,

MAX ROSENN
Circuit Judge

Dated: May 6, 1981

APPENDIX C

Opinion of the United States Court of Appeals, dated April 28, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-1606, 80-1607

FEDERATED METALS CORPORATION, a wholly owned subsidiary of ASARCO, INCORPORATED,

v.

UNITED STEELWORKERS OF AMERICA (AFL-CIO) and its LOCAL UNION, NO. 365, labor organizations and THE AMERICAN ARBITRATION ASSOCIATION

FEDERATED METALS CORPORATION,

Appellant in No. 80-1606.

UNITED STEELWORKERS OF AMERICA (AFL-CIO), and its LOCAL UNION, No. 365, labor organizations,

Appellants in No. 80-1607.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civ. No. 78-2568)

Argued January 13, 1981

Before: SEITZ, *Chief Judge,*
ROSENN and SLOVITER, *Circuit Judges*

(Filed April 28, 1981)

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OPINION OF THE COURT

SEITZ, *Chief Judge.*

Federated Metals Corporation appeals from an order of the district court compelling the parties to arbitrate the disputed pension claims on the motion of the United Steelworkers of America (the Union) for summary judg-

ment. The Union cross-appeals from an order of the district court denying its demand for arbitration of the disputed disability claims.

I.

The Union and American Smelting & Refining Company (ASARCO), the parent corporation of Federated Metals, entered into a Collective Bargaining Agreement and a Pension and Disability Agreement in 1974.[1] In 1977, ASARCO closed part of its facility at Perth Amboy, New Jersey. Effective April 1, 1977, Federated Metals acquired the remaining portions of ASARCO's Perth Amboy facility. Federated Metals employed approximately ninety-four former ASARCO employees and assumed both the Collective Bargaining Agreement and the Pension and Disability Agreement. Both of these agreements were to expire on June 30, 1977.

During June of 1977, Federated Metals and the Union met to negotiate new agreements. When they failed to reach agreement, the Union commenced an economic strike and picketing against Federated Metals on July 1. Negotiations continued during the strike. After seven months of negotiations and six months of strike, Federated Metals considered negotiations to be at an impasse. It

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1 The pension and disability claims are based on three documents: the Pension and Disability Agreement referred to in text: the ASARCO Retirement Income Plan (Retirment Plan); and the ASARCO Plan for Permanent and Total Disability Benefits (Disability Plan). The Retirement Plan and the Disability Plan were applicable to ASARCO employees throughout the United States. Part I of the Retirement Plan and the entire Disability Plan were applicable to the employees at the Perth Amboy plant. The Pension and Disability Agreement contained amendments to and variations from the multi-plant Retirement and Disability Plans, for which the Union and ASARCO had collectively bargained.

informed the Union of its decision to close the plant, and on January 11, 1978, it publicly announced this decision.

On April 7, 1978, the pension claimants filed claims for benefits under the Pension and Disability Agreement. The pension retirement benefits sought were 70/80 benefits, which provide for early retirement benefits at age fifty-five if an employee attains age plus continuous service credits of seventy years or more, or if he or she has not reached fifty-five and attains age plus continuous service credits of eighty years or more.[2] On April 24 and May 18, the disability claimants filed claims for disability benefits under the Pension and Disability Agreement. Neither the pension nor the disability claimants were eligible for benefits at the time the agreement expired. If it is permissible to consider events that occurred between the expiration date of the agreement and the plant shutdown, each claimant has met the factual prerequisites for qualifying for benefits.

Federated Metals denied the claims of both the pension and disability claimants. The Union filed a request for arbitration of these disputes, but Federated Metals filed a complaint in federal district court requesting a stay of the arbitration proceeding.

The Retirement Plan and the Disability Plan provide that the interpretation of the Plans and determinations as

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2 Article I, Section 2(b) of the Pension and Disability Agreement provides:

> (b) *Early Retirement*. . . .
>
> *70/80 Formula.* Any Employee who is laid off due to the permanent shutdown of the total Plant at which he or she is employed and which is covered under the Agreement may elect to retire and receive a '70/80' retirement benefit, provided such employee:
>
> (1) has reached age 55 and attained age plus Continuous Service totals 70 years or more, or
>
> (2) has not reached age 55 and attained age plus Continuous Service totals 80 years or more.

to eligibility under the Plans are reserved to the Pension Board for the Retirement Plan[3] and to the employer for the Disability Plan.[4] The Pension and Disability Agreement contains a limited arbitration agreement that subjects three types of disputes to arbitration: the number of years of continuous service; the claimant's age; and the cause of the permanent or total disability (for disability benefits).[5]

On January 23, 1980, the district court ruled from the bench on the parties' cross-motions for summary judgment. It ordered arbitration of the pension claims, find-

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3 The Retirement Plan provides:

> The Pension Board shall establish rules and regulations for the administration of the Plan and, except as otherwise expressly provided in the Plan, the interpretation of the Plan and determination of any question as to the eligibility for or amount of benefits and months of Continuous Service of an Employee or any question whatsoever arising in connection therewith, shall rest entirely with the Pension Board.

4 The Disability Plan provides:

> [ASARCO], as administrator of the Plan, shall be solely responsible for the establishment of such rules and regulations as may be required for the operation and administration of the Disability Plan.
>
> In determining the eligibility of any employee, as to the length and continuity of his service, the existence of permanent and total disability, and any other application of the Plan, the decision of the Company shall be final, consistent with any existing agreements with representatives of employees.

5 Article III, Section 1 of the Pension and Disability Agreement provides:

> *Section 1. Appeals procedure.* If any difference shall arise between any employee . . . and the Company as to:
>
> (a) the number of years of continuous service of an employee:
>
> (b) the age of such employee; or
>
> (c) whether permanent and total disability did or did not result from the cause listed . . .,
>
> . . .the question may be submitted by either party for arbitration to the American Arbitration Association.

ing that the subject matter of the Union's claim related to the number of years of service, which was arbitrable under the Pension and Disability Agreement. In ordering arbitration, the court found that the dispute arose *under* the agreement even though it arose *after* it had expired, and that the Union did not delay unreasonably in filing its claim for arbitration. Therefore, the court held that the pension claims were arbitrable under the reasoning of *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers,* 430 U.S. 243 (1977) (*Nolde*).

The court denied the Union's request for arbitration of the disability claims. It found that the grievances did not relate to age, to years of service, or to the cause of injury. Because only these three types of disputes were subject to arbitration under the Pension and Disability Agreement, the court ruled that the disability claims were not arbitrable.

II.

Determining whether a particular grievance is arbitrable is a matter of contract interpretation; the parties may draft a narrow arbitration clause that excludes particular types of disputes from arbitration or that provides for termination of the arbitration agreement at the termination of the collective bargaining agreement. *See, e.g., United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582 (1960). However, the strong federal policy favoring arbitration as the method to resolve labor disputes should guide a court when it decides whether an arbitration clause covers a particular grievance. *See United Steelworkers v. American Manufacutring Co.,* 363 U.S. 566 (1960); *United Steelworkers v. Warrior & Gulf Naviation Co.,* 363 U.S. 574; *United Steelworkers v.*

Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (the *Steelworkers Trilogy*). Further, if the subject matter of a particular grievance is arbitrable, the fact that it arises after the collective bargaining agreement has expired does not necessarily abrogate the duty to arbitrate. *See Nolde*, 430 U.S. 243.

With these principles in mind, we will examine Federated Metals' arguments, first advanced in the district court, that the pension disputes are not arbitrable. Federated Metals concedes that *Nolde* established a presumption of postcontract arbitrability. However, Federated Metals argues that the presumption is overcome in this case by two indications that the parties did not intend to submit these pension grievances to arbitration: (1) the Pension and Disability Agreement contains a narrow arbitration clause that is limited to three kinds of disputes and (2) the pension benefits accrued after the agreement had terminated, whereas the severance-pay claims in *Nolde* accrued before termination. Further, Federated Metals contends that it need not arbitrate over the pension disputes because the Union did not assert these claims within a reasonable time after the agreement had expired.

A.

Federated Metals argues that the parties have not expressed the clear preference for an arbitral forum that was present in *Nolde*. It contends that the narrow arbitration clause contained in the Pension and Disability Agreement demonstrates that the parties did not intend to arbitrate pension disputes arising after termination of the agreement. Otherwise, according to Federated Metals, the arbitrator in effect would be deciding whether the sub-

stantive provisions of the Pension and Disability Agreement survive termination under the guise of deciding the number of years of continuous service. Federated Metals views this result as being inconsistent with such a narrow clause.

Although we agree that the Pension and Disability Agreement contains a narrow arbitration clause limited to three types of disputes and that the arbitration clauses in the *Steelworkers Trilogy* and *Nolde* were broad, we do not believe that the strong federal policy favoring arbitration operates only when there is a broad arbiration clause. We believe that the parties still express a clear preference for arbitration when they draft a narrow arbitration clause, they merely limit this preference to a narrow range of disputes.

We recognize that when the arbitration clause is narrow, a court may scrutinize the underlying grivance more closely to determine whether the subject matter of the dispute is arbitrable. However, a court does this not because the presumption of arbitrability is inapplicable, but because the parties have narrowed the court's focus from a determination of whether the dispute arguably relates to the collective bargaining agreement (or, more broadly, to "any dispute" between the parties), to a determination of whether the dispute arguably relates to a particular type of grievance. *See Federation of Westinghouse Independent Salaried Unions v. Westinghouse Electric Corp.*, 482 F. Supp. 308 (W.D. Pa. 1980). When a court examines the underlying grievance to determine whether it is one that the parties have included in their narrow agreement to arbitrate, it should not deny arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United*

Steelworkers v. Warrior & Gulf Navigation Co, 363 U.S. at 582-83. Therefore, even when the arbitration clause is narrow, doubts should be resolved in favor of arbitration.

We are not persuaded otherwise by Federated Metals' citation to Justice Brennan's concurring opinion in *United Steelworkers v. American Manufacturing Co.,* 363 U.S. 569 (concurring in all three cases comprising the *Steelworkers Trilogy*). After noting that the ambiguous exclusion clause in *Warrior & Gulf* suggested that the parties were more concerned with allowing the arbitrator to render decisions than with restraining the arbitrator's jurisdiction, Justice Brennan hypothesized:

> The case might of course be otherwise were the arbitration clause very narrow, or the exclusion clause quite specific, for the inference might then be permissible that the parties had manifested a greater interest in confining the arbitrator; the presumption of arbitrability would then not have the same force and the Court would be somewhat freer to examine the merits.

Id. at 572-73. We believe that Justice Brennan was referring to the courts' increased freedom to scrutinize the underlying dispute to determine whether it was over an arbitrable issue. We do not interpret his statement as indicating that once a court has engaged in such increased scrutiny and has determined that the dispute at least arguably concerns one of the specified arbitrable issues, it should then refuse to resolve any doubt over arbitrability in favor of arbitration.

Moreoever, Justice Brennan makes this statement only in describing the degree of permissible judicial scrutiny in determining whether the subject matter of a dispute is

arbitrable. In this case, it is undisputed that the grievance would have been arbitrable if it had arisen during the life of the Pension and Disability Agreement. The Union asserts that the pension claimants have the requisite number of years of continuous service and the company contends that they do not. Thus, on its face, this dispute is over the number of years of continuous service, which is one of the three issues subject to arbitration. In calculating the number of years, the Union included time after the agreement had expired while the claimants were on strike because, in its view, termination of the agreement did not constitute a "break" in the number of years of continuous service. However, we do not view this dispute over whether termination of the agreement constituted a "break" as being any different from similar disputes during the life of the agreement concerning "breaks" in a claimant's continuous service. Therefore, we conclude that the subject matter of the pension dispute is arbitrable.

Having concluded that the pension dispute is over the number of years of continuous service, which is one of the types of issues covered by the arbitration clause, we now must determine whether the arbitration clause survived termination of the Pension and Disability Agreement. In making this determination, we are guided by the *Nolde* presumption favoring postcontract arbitration. We do not agree with Federated Metals that the fact that the parties have agreed to a narrow arbitration clause renders the *Nolde* presumption inapplicable. Although the arbitration clause reviewed in *Nolde* was broad, the Court did not rely on this fact in determining that it survived contract termination. Therefore, we will enforce the agreement to arbitrate unless there is a clear indication of an intent to submit disputes to arbitration only if they

arise during the life of the agreement. Because we do not believe that the narrowness of the arbitration clause provides a sufficient indication of an intent to overcome this presumption, we will enforce the duty to arbitrate unless there are other indications of such an intent.

B.

Federated Metals argues that the *Nolde* presumption applies only when employees have *accrued* certain rights during the life of the contract and *realize* them after expiration. In this case, the pension claimants had not accrued sufficient continuous service credits to be eligible for 70/80 benefits by June 30, 1977. Because the right to these benefits had not accrued or vested at the time the Pension and Disability Agreement expired, Federated Metals reasons that the arbitrator would necessarily be adding to the terms of the agreement if the benefits were awarded.

To support its position, Federated Metals emphasizes that the union in *Nolde* argued that the right to severance pay had accrued during the life of the collective bargaining agreement and the United States Court of Appeals for the Fourth Circuit found this to be significant in ordering arbitration. *See Local No. 358, Bakery & Confectionery Workers v. Nolde Bros., Inc.*, 530 F.2d 548, 553 (4th Cir. 1975), *aff'd*, 430 U.S. 243 (1977). Although the Supreme Court noted that this was the union's argument, *see* 430 U.S. at 248, it did not appear to rest its decision on this ground. Instead, the Court found it significant that both the union's claim for the benefits and the company's refusal to pay them were based on differing perceptions of the expired collective bargaining agreement. The union maintained that the right to severance pay was a "vested"

right, which did not terminate with the agreement, while the company viewed severance pay as a creation of the collective bargaining agreement, which terminated with that contract. *See id.* at 248-49. The Court reasoned that "it is clear that, whatever the outcome, the resolution of that claim hinges on the interpretation utlimately given the contract clause providing for severance pay. The dispute, therefore, although arising *after* the expiration of the collective-bargaining contract, clearly arises *under* that contract." 430 U.S. at 249 (emphasis in original).

We do not believe that the somewhat esoteric determination that the disputed right to a particular benefit has vested or accrued should control the decision whether the duty to arbitrate the dispute survives contract termination. When the parties have agreed to a broad arbitration clause, the duty to arbitrate survives termination of the agreement if the dispute arises under the expired agreement; when the parties have agreed to a narrow arbitration clause, the duty to arbitrate survives if the dispute is over one of the specified arbitrable subjects *and* arises under the expired agreement. It is not necessary that the disputed right have vested because there is nothing to prohibit the parties from agreeing that certain benefits might accrue after the contract has expired. For example, in *United Steelworkers v. Fort Pitt Steel Casting*, 598 F.2d 1273 (3d Cir. 1979) (*Fort Pitt I*), the collective bargaining agreement expressly provided that the company would continue to pay certain benefits as they accrued during a labor dispute after the collective bargaining agreement had terminated. Morover, in *Local No. 595, International Association of Machinists v. Howe Sound Co.*, 350 F.2d 508 (3d Cir. 1965), we held that claims for holiday pay and pro-rata vacation pay that

allegedly accrued after contract expiration were arbitrable. In so holding, we reasoned that the "right to holiday and pro rata vacation pay exists, if at all, under the agreement. The fact that it *would accrue and become payable* after the expiration of the agreement would not eliminate the Company's obligation." *Id.* at 511 (emphasis added).

The dispute here, like that in Nolde, turns on differing interpretations of the expired Pension and Disability Agreement, and thus arises under that agreement. Moreover, it arises over a subject the parties have agreed to arbitrate—*i.e.*, the number of years of continuous service. The Union interprets the Pension and Disability Agreement as allowing employees to accumulate additional service credits for two years after layoff, and as not providing that this right will be abrogated by expiration of that agreement. Therefore, when calculating the number of years of continuous service, the Union included time after the agreement had expired. As a result, the Union contends that the pension claimants have a sufficient number of years of continuous service to qualify for the benefits. On the other hand, Federated Metals contends that the claimants do not have a sufficient number of continuous service credits because termination of the agreement constituted a "break" and service credits no longer continued to accrue. The resolution of this dispute depends on the proper construction of the expired Pension and Disability Agreement and also on the proper method of calculating continuous service credits.

Therefore, this claim arises under the Pension and Disability Agreement and is based on differing interpretations of how to calculate the number of years of continuous service. We conclude that the district court was

correct in holding that the pension dispute is arbitrable under the Supreme Court's reasoning in *Nolde*, even though the claimants had not accrued enough credits to be eligible at the time the agreement terminated.

C.

Alternatively, Federated Metals contends that the dispute is not arbitrable because the Union did not assert the claims within a reasonable time. The district court found that the Union did not delay unreasonably in pursuing these claims. It recognized that these rights were not asserted until nine months after termination, but found this to be reasonable because the parties were not sure of their status until January 11, 1978.

Federated Metals argues that the "reasonable time" alluded to in *Nolde* has nothing to do with whether the Union delayed unreasonably, but merely refers to the actual time that has elapsed since the contract terminated. Although there may be some situations in which so much time has elapsed since the contract expired that to order arbitration would be unfair despite the fact that the union has not delayed unreasonably, we do not believe that this is such a case. In this case, as in *United Steelworkers v. Fort Pitt Steel Casting*, 635 F.2d 1071 (3d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3727 (U.S. March 16, 1981) (No. 80-1564) (*Fort Pitt II*), the grievances arose while the unions were negotiating for a new agreement after the old agreement had expired. In cases such as these, we believe that the proper inquiry is whether the union delayed unreasonably in asserting the disputed claims. We agree with the district court that there was no unreasonable delay in asserting the pension claims.

III.

The two disability claimants became disabled during the strike after the Pension and Disability Agreement had expired. The district court denied the Union's demand for arbitration, reasoning that Federated Metals did not dispute the number of years of continuous service, the age, or the cause of the disability of either of these employees. Therefore, the Union's grievance did not fall within one of the three categories of arbitrable issues under the Pension and Disability Agreement.

Although denying arbitration for the disability claimants may seem inconsistent with granting arbitration for the pension claimants, we believe that the decision of the district court should be affirmed. Federated Metals concedes that the disability claimants have the requisite years of continuous service, that they are of the requisite age, and that the cause of the disability was one covered under the agreement. The Union argues that it interprets the Pension and Disability Agreement as providing that an employee with a sufficient number of years deserves his or her disability benefits. Because the claimants have enough years, the Union characterizes Federated Metal's refusal to pay benefits as a "dispute over the effects of having a given number of years of service." However, even if we assume that this characterization of the dispute is plausible, it only demonstrates that the dispute arises under the Pension and Disability Agreement. It does not support the contention that the dispute is also over an arbitrable issue. A dispute over the *effects* of having a sufficient number of years of continuous service credit is not a dispute over the *number* of years, or the method of calculating those years, of credit. Therefore, we believe that this dispute can only be viewed as whether the

substantive provisions for disability benefits survive contract termination. This is not one of the disputes included in the arbitration clause.

IV.

We conclude that the pension dispute is over the number of years of continuous service, which is arbitrable under the arbitration clause of the Pension and Disability Agreement. We also find that the arbitration clause survives termination of that agreement, and that the Union did not delay unreasonably in asserting the pension claims. Further, we conclude that the disability dispute is not over one of the issues covered by the arbitration clause.

V.

The orders of the district court will be affirmed.

ROSENN, *Circuit Judge*, concurring.

For the reasons set forth in part III of my dissenting opinion in *United Steelworkers of America v. American Smelting and Refining Co.*, No. 80-1587 (3d Cir. DATE), decided this same day, I do not join in that portion of the majority's opinion which purports to hold that "there is nothing to prohibit the parties from agreeing that certain benefits might accrue after the contract has expired." Maj. op., typescript at 10. However, because the merits of the underlying disputes are not properly before us, *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 568 (1960), the objectionable statement has no bearing on our disposition of this case. I

therefore concur in the result reached by the majority and in so much of its reasoning as is consistent with part III of my dissent in the companion case.

APPENDIX D

Opinion of the United States District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 79-1531

UNITED STEELWORKERS OF AMERICA, et al.,

Plaintiffs,

vs.

AMERICAN SMELTING AND REFINING CO., et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

March 4, 1980—Trenton, New Jersey

Before:

THE HONORABLE ANNE E. THOMPSON, *U.S.D.J.*

Appearances:

Messrs. Rothbard, Harris & Oxfeld, By: Sanford Oxfeld, Esq., Arnold Cohen, Esq., *For the Plaintiffs.*

Messrs. Carpenter, Bennett & Morrissey, By: Edward Ryan, Esq., *For the Defendants.*

THE COURT: This matter comes before the Court on defendant's motion for summary judgment to vacate an arbitration award. Underlying this action is a claim by plaintiff, the United Steelworkers of America, AFL-CIO, and its local Union, No. 3[illegible], [hereafter "unions"], that defendant, Federated Metals Corporation, [hereafter "company"], breached a collective bargaining agreement by failing to pay security and severance benefits to employees terminated as a result of a plant shutdown.

This Court on July 18, 1978 ordered the company and the unions to arbitrate both the security and severance pay dispute and the arbitrability of such dispute. By opinion dated March 6, 1979, the arbitrator found the dispute arbitrable and the company to have violated the collective bargaining agreement. The company here seeks to vacate the arbitrator's award.

Briefly, the facts of the case follow. On April 1, 1977 the company acquired from ASARCO, Incorporated an electrolytic copper refinery and manufacturing facilities for lead and copper alloy products in Perth Amboy, New Jersey. Thereafter, the company employed approximately 94 former ASARCO employees covered by a 1974-77 collective bargaining agreement between ASARCO and the plaintiff-unions. The company also assumed the collective bargaining agreement between ASARCO and the unions. This collective bargaining agreement is the subject of this suit.

During negotiations for the 1974-77 agreement, ASARCO and the unions agreed to institute a new arbitrator selection process in place of the New Jersey Board

of Mediation panels previously used. Under that agreement, the parties would meet "to mutually agree on five names of arbitrators to constitute a permament [for the term of this contract] list of arbitrators." Until such arbitrators were selected, arbitrators—if needed—would be selected from the New Jersey Mediation Board. The parties subsequently agreed upon a list of five arbitrators in a memorandum providing that "these arbitrators and this procedure shall continue for the term of the agreement, expiring June 30, 1977."

The 1974-77 agreement also provided for a security and severance plan. The benefits thereunder were to be paid to "Laid-off employees [for lack of work only."

The 1974-77 agreement expired on June 30, 1977. Prior to that date, the parties attempted unsuccessfully to negotiate a new contract, and, on July 1, 1977, an economic strike ensued. The unions contend that the company promised to keep in effect the security and severance plan during the negotiations which continued. The company denies making any such promise.

On January 11, 1978, the company publicly announced the plant's permanent closing as a result of the strike. The unions subsequently made a claim for security and severance benefits allegedly due under the expired collective bargaining agreement. The company refused payment and grievance procedures were instituted. Such procedures led to th Arbitrator's award which the company challenges.

The company here contends that the Arbitrator's award in favor of the unions should be vacated since it does not draw its essence from the collective bargaining agreement. In particular, the company alleges:

> 1) that the security and severance pay claim was not arbitrable because the contract expired on June 30,

1977 and because the claim was not submitted within a reasonable period of time after the contract's termination;

2) that the arbitrator exceeded his authority because the employees terminated as a result of a shutdown were not laid off for lack of work; and

3) that even if the employees had been laid off for lack of work, they would not be entitled to security pay because that benefit was not earned until after expiration of the 1974-77 agreement.

Before reaching the question whether the arbitrator's award was in error, we must note the Court's proper role in reviewing an arbitrator's interpretation of a collective bargaining agreement: The scope of judicial review is a narrow one. *Amalgamated Meat Cutters & Butcher Workers of America; Local 195 v. Cross Brothers Meat Packers,* 518 F.2d 1113, 1118 (3rd Cir. 1975). "It is the arbitrator's construction which was bargained for and so far as the arbitrator's decision concerns the construction of the contract, the courts have no business overturning him because their intepretation of the contract is different from his." *Ludwig Honold Mfg. Co. v. Fletcher,* 405 F.2d 1123, 1125 (3rd Cir. 1969). An award is legitimate, however, only so long as it draws its essence from the collective bargaining agreement—that is, if the interpretation can in any way be derived from the agreement, viewed in light of its language, its context and any other indicia of the parties' intention. *Id.* at 1125, 1128.

With these considerations in mind, we hold that the arbitrator's award did draw its essence from the contract and that the award must therefore be confirmed. We address the company's objections to the award in order.

First, the company contends that the security and severance pay claim was not arbitrable because the contractual agreement to arbitrate expired on June 30, 1977 and because the claim was not submitted within a reasonable period of time thereafter. The company relies upon the parties' written agreement to agree upon a list of arbitrators to constitute a permanent list "for the term of the contract" and upon the subsequent agreement itself to the same effect. In the company's view, the arbitrator ignored the express or implied intent of the parties in finding arbitrable the security and severance plan dispute.

We disagree. True, the duty to arbitrate is a matter of contract, and a party can be required to submit a dispute to arbitration only if the party has agreed to arbitrate the dispute. *Nolde Brothers, Inc. v. Local 358, Bakery Workers,* 430 U.S. 250 (1977). There exists a strong presumption, however, favoring arbitrability. Specifically, arbitrability "should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 581 (1960). This presumption favoring arbitration has recently been extended to arbitrators in a post-contract termination setting. *Nolde Brothers, Inc. v. Local 358, Bakery Workers, supra.* The Supreme Court in *Nolde Brothers,* citing *John Wiley & Sons v. Livingston,* 376 U.S. 543 (1964), explained that parties' obligations under arbitration clauses survived a contract's termination when the dispute was over an obligation arguably created by the expired agreement.

In the wake of *Nolde,* the arbitrator found that providing for a forum of several arbitrators whose term of office ends with the expiration of the contract does not,

standing alone, constitute an express or implied intent to exclude from arbitration contract disputes arising after the termination of the agreement.

> "Absent explicit language to the contrary, the bare use of named arbitrators cannot be construed as terminating the obligation to arbitrate after the end of the contract."

We are satisfied that the arbitrator's finding of arbitrability drew its essence from the contract. As in *Nolde*,

> "there is nothing in the arbitration clause that expressly excludes from its operation a dispute which arises under the contract but which is based on events that occur after its termination. The contract's silence, of course, does not establish the parties intent to resolve post-termination grievances by arbitration. But in the absence of some contract indication, there are strong reasons to conclude that the parties did not intend their arbitration duties to terminate automatically with the contract."

430 U.S. at 253.

Equally unpersuasive is the company's contention that the security and severance pay claims were not arbitrable because they were not submitted within a reasonble period of time after the contract's termination. Once it is determined that the parties are obligated to submit the subject matter of a dispute to arbitration, procedural questions stemming from the dispute and bearing on its final disposition should be left to the arbitrator. *John Wiley & Sons, Inc. v. Livingston, supra.* The arbitrator's silence on this issue cannot be interpreted to mean that he did not consider it. Arbitrators have no obligation to the

Court to give their reasons for an award, and the arbitrator may have decided that the issue did not merit independent discussion. *Amalgamated Meat Cut, Etc. v. Cross Brothers M.P., Inc.*, 518 F.2d 1113, 1121 (3rd Cir. 1975).

Further, we cannot say that the union's grievance was untimely. The *Nolde* Court refused to speculate as to the arbitrability of post-termination contractual claims which, unlike the one there presented, are not asserted within a reasonable time after the contract's expiration. Where, as here, the contract expired on June 30, 1977, the unions were informed of the decision to close the plant on either December 29, 1977 or on January 28, 1978, and the unions made a claim for security and severance benefits on January 19, 1978, we are not prepared to say that the claim was untimely.

The security and severance plan dispute was therefore arbitrable.

We turn next to the company's contention that the arbitrator exceeded his authority in concluding that the company violated the security and severance plan because the employees were terminated as a result of a shutdown and the security and severance plan provided benefits only to employees laid off for lack of work. In the company's view, the contractual language is clear and unequivocal, and the arbitrator's decision cannot stand.

We are satisfied that the arbitrator's award draws its essence from the collective bargaining agreement. *See Ludwig Honold Mfg. Co. v. Fletcher, supra.* Only a manifest disregard of the agreement, unsupported by principles of contract construction and the law of the shop should not be permitted to stand. *Id.* at 1128. Indeed an arbitrator may look for guidance from other sources. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). This is

precisely what the arbitrator did. In particular, the arbitrator looked to the company's operati history. On January 21, 1976, ASARCO commenced a shutdown of its Perth Amboy refinery and the attendant facilities. The refinery operations terminated in March, 1976 while the copper and lead product plants continued in operation. Those employees who lost their jobs due to the shutdown received full security and severance benefits. Based on this history, the arbitrator explained:

> "Because I do not find any significant difference between the plant closing of ASARCO and the later cessation of operations by [the company], I judge the application of [the security and severance plan] of the contract by ASARCO to have a precedential effect on the closing of its subsidiary, [the company] . . . . How ASARCO . . . treated those employees whose jobs ended is both contractually and equitably the way [the company], who undisputedly assumed ASARCO's collective bargaining agreement with the union . . . should have treated its employees when it closed."

We cannot say that the arbitrator exceeded his authority or that his award failed to draw its essence from the collective bargaining agreement.

We turn next to the company's final contention—that even if the employees had been laid off for lack of work, they would not be entitled to security pay because that benefit was not earned until after expiration of the 1974-77 agreement. In the company's view, security pay was earned at the time of the layoffs whereas severance pay is an accrued benefit under the agreement. Because at the time of the layoffs the 1974-77 agreement was not in effect, the company argues security pay was never earned.

The company's contention is unwarranted. Absence from work because of an economic strike does not constitute a termination of the employer-employee relationship and does not vitiate the continuous service of an employee. *Local 7-644, Oil, Chemical and Atomic Workers International Union v. Mobil Oil Co.*, 350 F.2d 708 (7th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966). Further, it cannot be said that the arbitrator's award was in no rational way derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties' intention. *Ludwig Honold Mfg. Co. v. Fletcher supra.*

The arbitrator's decision must therefore stand. The company's motion is denied and the unions shall submit an order consistent with this opinion.

APPENDIX E

Letter Opinion of the United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Trenton, N.J. 08605

Chambers of
ANNE E. THOMPSON
Judge

March 13, 1980

NOT FOR PUBLICATION

ARNOLD S. COHEN, Esquire
Rothbard, Harris & Oxfeld
744 Broad Street
Newark, New Jersey 07102
(Attorney for Plaintiffs)

EDWARD F. RYAN, Esquire
Carpenter, Bennett & Morrissey
744 Broad Street
Newark, New Jersey
(Attorney for Defendants)

OPINION

Re: United Steelworkers of America, etc., et al. v. American Smelting and Refining Co., et al. Civil No. 79-1531

Gentlemen:

This letter opinion resolves plaintiffs' motion for summary judgment without benefit of oral argument. *Fed. R.*

Civ. P. 78. For the reasons set forth in this Court's opinion dated March 3, 1980, plaintiffs' motion is granted.

Very truly yours,

/s/ ANNE E. THOMPSON
U.S.D.J.

AET:mg

FILED
Mar 13 1980
at 11:00 a.m.
Angelo W. Locascio

APPENDIX F

Order of the United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 79-1531

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and its Local, PERTH AMBOY SMELTER AND REFINERY WORKERS UNION, NO. 365, both an unincorporated organization of more than 7 persons,

Plaintiffs,

v.

AMERICAN SMELTING AND REFINING COMPANY AND FEDERATED METALS,

Defendants.

For the reasons set forth in this Court's letter opinion dated March 13, 1980, it is

ORDERED that the plaintiffs' motion for summary judgment is granted.

/s/ ANNE E. THOMPSON, U.S.D.J.

March 13, 1980

FILED

APPENDIX G

Opinion of the United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Trenton, New Jersey — January 23, 1980

FEDERATED METALS CORPORATION, etc.,

Plaintiff,

vs.

UNITED STEELWORKERS OF AMERICA (AFL-CIO), et al.,

Defendants.

Before:

The Honorable DICKINSON R. DEBEVOISE,
United States District Judge.

APPEARANCES:

CARPENTER, BENNETT & MORRISSEY, *For the Plaintiff,* By: EDWARD F. RYAN.

ROTHBARD, HARRIS & OXFELD, *For the Defendants,* By: ARNOLD COHEN.

Hearing on Plaintiff's Motion for Summary Judgment

* * * * *

THE COURT:

* * * * *

I would like to rule on this at this time.

This matter is before the Court on a motion for summary judgment by the plaintiff, Federated Metals Corporation, seeking a declaratory judgment and an order staying arbitration sought by defendants, United Steelworkers of America and its Local Union No. 365.

In an exemplary manner, the parties stipulated in the pretrial order the material facts and have devoted their attention to the legal issues which remain.

This Court's jurisdiction is invoked pursuant to section 301 of the Labor Management Relations Act, 29 USC section 185 and the Declaratory Judgment Act, 28 USC sections 2201 et seq.

The disputes herein arise out of an economic strike and/or lockout at Federated's Perth Amboy, New Jersey, plant on June 30, 1977, and the shutdown of all operations on January 6, 1978, after the parties were unable to reach an agreement as to terms and conditions of employment. The union seeks to arbitrate under the Pension and Disability and Benefit Agreement the claims of eight former employees as to either disability or pension benefits based in part on events which occurred subsequent to the termination of the agreement.

In order to determine whether this Court may stay the arbitration sought by defendant union, the threshold issue to be resolved is whether the claims of the eight former employees involved here are encompassed by the arbitration provisions of the expired agreement.

The arbitration clause in question is found in Article III, section 1 of the Pension and Disability Agreement and provides arbitration as to:

> "(a) The number of years of continuous service of an employees; (b) the age of such employee or (c) whether permanent and total disability did or did not result from the cause listed in subparagraphs (1), (2), and (3) of subsection (b), section 1 of Article II . . ."

Article II, section 1(b)(1), (2) and (3) provides that a "permanent and total disability is one which was not the result of engaging in a criminal enterprise, self-inflicted injury or of military.

Six grievants seek retirement under Article I, section 2(b) of the expired agreement. Federated rejected the request to arbitrate these claims because the complainants did not have the required service and age credits but sought service credits for a period of time subsequent to the termination of the agreement. Federated did not challenge the fact that were the agreements still in effect, the six claims for the pension payments would be arbitrable pursuant to Article III, section 1 of the expired agreement. These six grievants are merely asking that a arbitrator compute their years of service and ages to determine their pension eligiblity.

Federated does dispute that the two disability benefit claims were ever encompassed by the arbitration provision of the agreement. Federated rejected defendants' request to arbitrate the disability benefit claims because their disabilities did not occur until subsequent to the termination of the agreement on June 30, 1977, not by reason of any question of the employees' years of continuous service, age or cause of disability.

Thus Federated argued no question remained for the arbitrator to decide.

Arbitrability "should not denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 at 581 (1960).

There is no doubt that the arbitration clause in the instant matter does not cover the disability benefit claims, since there is no dispute involving their continuous service, their age or whether their disability resulted from a cause listed in Article II, section 1(b)(1), (2), or (3). The agreement's arbitration provision is limited to three types of disputes and, as shown, none of them is involved here.

In dealing with a narrower arbitration clause, it is proper for a court to consider whether the conduct in issue is on its face within the purview of the arbitration clause. *Rochdale Village, Inc. v. Local 80,* 102 LRRM 2477 (2d Cir. 1979). Accordingly, the defendant unions may not seek arbitration for grievants Esteves' and Grant's disability claims.

The remaining question is whether Federated is obligated to arbitrate the pension benefit claims which are alleged to have accrued after the collective bargaining agreement was terminated by its own terms on June 30, 1977. As to those claims, the disputed matters are within the expired contract's arbitration clause.

In *Nolde Bros. Inc. v. Local No. 358 Bakery Workers,* 430 U.S. 243 (1977), the Supreme Court held that the employer Nolde was obligated to arbitrate claims for severance pay which allegedly accrued after the labor contract was terminated.

The Court said as follows: " . . . the parties' failure to exclude from arbitrability contract disputes arising after

termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship. In short, where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication." At page 255.

Nolde Bros. and the union were parties to a collective bargaining agreement effective to July 21, 1973. That agreement contained a grievance and arbitration provision and a severance pay provision which was geared to an employee's length of service and amount of earnings. Subsequent to the expiration of the contract, the employer decided to permanently terminate its operations. Thus, the severance pay, if it were payable under the agreement, accrued on a date subsequent to the expiration of the agreement. The union's demand for severance pay was refused by the employer, as was its demand to arbitrate the claim, and the union instituted suit to compel arbitration. The Supreme Court held that the employer was obligated to arbitrate the claim.

Federated argues that *Nolde* has no application to this dispute, or if applied, does not require arbitration. Federated asserts three arguments for its position:

1. Federated argues that the policies and reasons leading the Supreme Court to conclude in *Nolde* that a "broad arbitration clause" survives contract termination are not present where, as here, the arbitration clause is limited. In these circumstances, Federated concludes, the principles of the *Nolde* case do not have application.

No court has limited Nolde to "broad arbitration clause" cases, and I decline to so hold. *Nolde*'s holding does not turn on its "broad arbitration clause." So long

as the dispute at issue would have been subject to resolution under the arbitration provision if it had arisen during the contract's term, the reasoning of *Nolde* still applies. That is, provided that there is nothing in the arbitration clause that expressly excludes a dispute which arose after the contract's termination, an employer is obligated to arbitrate an arbitrable dispute which arose after the labor contract terminated if it is in the category of disputes subject to arbitration. *Rochdale Village, Inc. v. Public Service Employee Union Local No. 80,* 102 LLRM 2476 (2d Cir. 1979) is consistent with this view and *Sun Oil Co. of Pennsylvania v. NLRB,* 576 F.2d 553 (3d Cir. 1978) is not in point.

Next, Federated argues that the disputed claims do not "arise under the agreement" within the meaning of *Nolde.* Federated interprets the decision in *Nolde* as limiting the arbitration of post-contract disputes to those disputes which involve the alleged survival of a right under the contract. Federated asserts that the retirement claims at issue came into existence, if at all, after the agreement expired, and therefore do not arise under the agreement.

The distinction drawn by Federated between rights surviving and rights coming into existence after the contract's termination is inapplicable to the instant matter. The defendants' claim for retirement benefits is the same as the union's claim for severance pay in the *Nolde* case. In *Nolde,* the resolution of the union's claim hinged "on the interpretation ultimately given the contract clause providing for severance pay." The *Nolde* court concluded that "The dispute, although arising after the expiration of the collective bargaining contract, clearly arises under that contract."

Likewise, the resolution of the defendant union's claim for retirement benefits depends on the interpretation of

the terminated agreement. The dispute, that is to say the grievant's right to retirement benefits, "clearly arises under the contract," although the dispute arose "after the expiration of the contract." I emphasize that I am expressing no opinion as to the merits of the controversy. Even if it were readily apparent that there is no merit to the claims of the persons in whose behalf the union speaks, it is the province of the arbitrator to make that decision.

Finally, Federated argues that the disputes herein are not arbitrable because the claims were not asserted within a reasonable time after the agreement's expiration on June 30, 1977. The union asserted its retirement claims on April 7, 1978, more than nine months after the agreement's expiration. The union's delay in filing for pension benefits, however, is not unreasonable since the grievants were unsure of their exact status until January 1978, the date the strike or lockout ended and the plant shut down.

Accordingly, I do not find that the delay is unreasonable.

I conclude that the majority decision in *Nolde Bros.* mandates that Federated is obligated to arbitrate the pension benefit claims. However, Federated need not arbitrate the disability claims because they are not encompassed by the arbitration provision of the expired agreement.

Plaintiff's motion for summary judgment is granted in part and denied in part, as indicated by the foregoing, and I request that Mr. Cohen should prepare an order in accordance with this opinion.

Any further we should take up?

MR. RYAN: No.

THE COURT: All right. Thank you. That was very clearly presented.

APPENDIX H

Final Judgment of the United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

The Honorable Dickinson R. Debovoise

Civil Action No. 78-2568

FEDERATED METALS CORPORATION, A WHOLLY OWNED SUBSIDIARY OF ASARCO, INCORPORATED,

Plaintiff,

—vs.—

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and its LOCAL UNION, NO. 365, LABOR ORGANIZATIONS,

Defendants.

This matter having been opened to the Court by Carpenter, Bennett & Morrissey, Edward F. Ryan, Esq., appearing, attorneys for plaintiff, Federated Metals Corporation, on plaintiff's motion for summary judgment, and Rothbard, Harris & Oxfeld, by Arnold S. Cohen, Esq., attorneys for defendants, United Steelworkers of America, AFL-CIO, and its Local Union No. 365, appearing in opposition, and making a cross-motion for summary judgment, and plaintiff opposing, and the Court having reviewed the motion papers, affidavits,

briefs in support and in opposition thereto and the argument heard by the Court on January 23, 1980; and for good cause shown,

It is on this 10th day of March, 1980,

ORDERED that the defendant's motion for summary judgment that the pension grievances of: (a) Joseph Skula, (b) John Relyk, (c) Robert Syslo, (d) Norman Peterson, (e) Joseph Sepash and (f) William English are arbitrable, pursuant to Article III, Section I of the Pension and Disability Benefits Agreement between the parties, dated April 28, 1977, is hereby granted and the plaintiff's motion for summary judgment that the grievances are not arbitrable is hereby denied and the parties are to proceed to arbitration;

IT IS FURTHER ORDERED that the defendants' motion for summary judgment that the pension grievances of (a) Joseph Skula, (b) John Relyk, (c) Robert Syslo, (d) Norman Peterson, (e) Joseph Sepash, and (f) William English, asserted pursuant to Article III, Section I of the Pension and Disability Benefits Agreement between the parties dated April 28, 1978, were filed in a timely fashion is hereby granted, and the plaintiff's motion for summary judgment that the grievances were not filed in a timely fashion is hereby denied.

IT IS FURTHER ORDERED that the defendants' motion for summary judgment that the disability claims of (a) Emilia Esteves and (b) Frank Grant, Jr. are arbitrable pursuant to Article III, Section I of the Pension and Disability Agreement between the parties, dated April 28, 1977, is hereby denied and the plaintiff's motion for summary judgment that the grievances are not arbitrable is hereby granted;

IT IS FURTHER ORDERED, accordingly, that the matter is hereby dismissed in its entirety.

/s/ DICKINSON R. DEBEVOISE,
U.S.D.C.J.

We hereby consent to the form of the within Order.

/s/ EDWARD F. RYAN
CARPENTER, BENNETT & MORRISSEY
Attorneys for Plaintiff

/s/ ARNOLD S. COHEN
ROTHBARD, HARRIS & OXFELD
Attorneys for Defendants

APPENDIX I

Judgment of the United States Court of Appeals, dated April 28, 1981

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 80-1587

(D. C. Civil No. 79-1531)

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and its Local, PERTH AMBOY SMELTER AND REFINERY WORKERS UNION NO. 365, both an unincorporated organization of more than 7 persons

vs.

AMERICAN SMELTING AND REFINING COMPANY and FEDERATED METALS COMPANY, corporations authorized to do business in the State of New Jersey,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present:

SEITZ, *Chief Judge*
and ROSENN AND SLOVITER, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on January 13, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 13, 1980, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

/s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

April 28, 1981

APPENDIX J

Judgment of the United States Court of Appeals, dated April 28, 1981

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 80-1606/80-1607

(D. C. Civil No. 78-2568)

FEDERATED METALS CORPORATION, a wholly owned subsidiary of ASARCO, INCORPORATED,

Appellant in No. 80-1606

VS.

UNITED STEELWORKERS OF AMERICA (AFL-CIO) and its LOCAL UNION, NO. 365, labor organization and THE AMERICA ARBITRATION ASSOCIATION

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and its LOCAL UNION, NO. 365, LABOR ORGANIZATIONS,

Appellants in No. 80-1607

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present:

SEITZ, *Chief Judge*
and ROSENN AND SLOVITER, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on January 13, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 11, 1980, be, and the same is hereby affirmed. Costs taxed against appellant in No. 80-1606 and appellants in No. 80-1607.

ATTEST:

/s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

April 28, 1981

APPENDIX K

Arbitration Opinion and Award in *United Steelworkers of America, et al. v. American Smelting and Refining Company, et al.* dated March 6, 1979

In The Matter of The Arbitration between

UNITED STEEL WORKERS OF AMERICA AFL-CIO, & LOCAL PERTH AMBOY SMELTER AND REFINERY WORKERS UNION #365

and

FEDERATED METALS COMPANY.

OPINION AND AWARD

The stipulated issue is:

> Is the claim for security and severance pay arbitrable? If so, did Federated Metals Company violate the security and severance provisions of the collective bargaining agreement by failing to pay said security and severance to employees eligible? If so, to what are those employees entitled?

A hearing was held on October 30, 1978 at the offices of the New Jersey State Board of Mediation in Newark, New Jersey at which time representatives of United Steelworkers of America, Perth Amboy Smelter and Refinery Workers' Union No. 365, AFL-CIO, hereinafter

referred to as the "Union" and Federated Metals Company, hereinafter referred to as "Federated", appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. A stenographic record was taken and post-hearing briefs were filed.

I do not find the facts and relevant contract clauses of the instant case significantly distinguishable from *Nolde Bros., Inc. v. Local No. 358 Bakery Workers,* 430 U.S. 243, 94 LRRN 2753 (1977). Despite any private reservations about the majority decision in *Nolde,* as a decision of the United States Supreme Court on the matter of arbitrability, I am bound to its holding and may not under similar facts and law substitute my judgment for that of the Court.

The "distinction" upon which Federated relies—namely that in the instant case unlike *Nolde* the arbitration forum is one of several contractually named and rotationally appointed arbitrators whose term of office ends with the expiration of the contract—does not, standing alone, constitute within the meaning of *Nolde* an express or clearly implied intent to exclude from arbitration contract disputes arising after termination of the agreement. Absent explicit language to the contrary, the bare use of named arbitrators cannot be construed as terminating the obligation to arbitrate after the end of the contract any more than if the contract provided for the appointment of the arbitrator by any agency or by some other ad hoc means. The fact is that if under *Nolde,* a dispute under the contract remains arbitrable even if it arises after the contract expiration, the forum for arbitration, as set forth in the contract must perforce maintain its vitality and effectiveness in order to ensure the imple-

mentation of the right to arbitrate. And that is so, absent explicit language or a clear intent to exclude *such disputes* from arbitration whether the arbitration forum be ad hoc appointments, a permanent umpire, or as here a rotating panel.

Consequently, irrespective of any personal reservations I may have about the majority decision in *Nolde,* I find it applicable to the dispute before me, rendering that dispute arbitrable.

The issue involves the application and interpretation of Article XV (Security and Severance Plan), the pertinent part of which reads:

> PAYMENTS:
> Laid-off employees (for lack of work only):

This arbitrator is mindful of and has researched the many arbitration decisions dealing with plant closings. The question of whether plant closings cause a "lay-off because of a lack of work" of those workers whose jobs end with the plant closing is hardly well settled. Citing one of my own AWARDS, I ruled in *Brewery Workers Joint Local Executive Board of New Jersey and Locals 843, 153 and 4, IBT and—P. Ballantine & Sons, and Balco, Inc.* (June 14, 1972) that the permanent shutdown of the Ballantine plant in New Jersey and the sale of its assets to the Falstaff Brewing Company constituted a "layoff" of the affected employees under a relevant contract provision, requiring continuation of welfare payments for a stated period following the cessation of operations.

On the other hand, in the instant case Federated did not close down its operations under circumstances unrelated to the Union, but rather closed, in part at least, for lawful economic reasons while confronted with an on-go-

ing lawful strike by the Union and its members. It can be argued that in *Ballantine* the employer was in complete control over whether he made work available or not to the employees who were *at work*, and that the cessation of operations was a unilateral managerial act that created a "lack of work" beyond the employees fault or control. By contrast, in the instant matter, the employees were *not* at work, presumably would not have accepted work even if made available unless a new contract with acceptable terms had been agreed upon and hence may be deemed to have contributed to or shared in some of the responsibility for the plant closing.

However, as the strike and plant closing in the instant matter were both apparently lawful economic actions, I conclude that it would be wrong if in this proceeding either side gained a benefit or suffered some prejudice by those actions. Hence I shall not deem them determinative or even probative.

To my mind what is significant is that under the same contract and same contract provisions, Federated's parent, ASARCO some months earlier closed a large portion of its operation at this location, and made security and severance payments under Article XV of the contract to its employees whose jobs ended and who were not retained in employment for certain continuing operations by Federated. Because I do not find any significant difference between the plant closing at ASARCO and the later cessation of operations by Federated, I judge the application of Article XV of the contract by ASARCO to have a precedential effect on the closing of its subsidiary, Federated. I conclude both closed down essentially for economic reasons; that the employees of both lost their jobs under similar conditions and that how ASARCO, under Article XV treated those employees whose jobs

ended is, both contractually and equitably the way Federated, who undisputedly assumed ASARCO's collective bargaining agreement with the Union covering the instant affected should have treated its employees when it closed.

The Undersigned, duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

> The claim for security and severance pay is arbitrable.
>
> Federated Metals Company violated the security and severance provisions of the collective bargaining agreement by failing to pay said security and severance to employees eligible. It shall make such payments to eligible employees in accordance with Article XV of the collective bargaining agreement.

/s/ ERIC J. SCHMERTZ
Arbitrator

Dated: March 6, 1979

State of New York,
County of New York, ss.:

On this sixth day of March, 1979 before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

/s/ JOYCE M. BURICH
Notary Public, State of New York
No. 31-4678000
Qualified in New York County
Commission Expires March, 30 1980.

APPENDIX L

Excerpted Collective Bargaining Agreement Between American Smelting & Refining Company and Perth Amboy Smelter & Refinery Workers' Union No. 365, United Steelworkers of America (AFL-CIO)

ARTICLE III—GRIEVANCES AND ARBITRATION

Section 1—There shall be established a Committee of not more than six (6) employees designated by the Union which shall have the power to deal with the Management on all grievances and other questions arising under this Agreement, with the exception of established wages or the Plant wage scale, which are not subject to discussion as a grievance or to be submitted to arbitration. A grievance is defined to be any controversy between the parties or between the Company and employees covered by this Agreement, (1) as to any matter relating to working conditions or wage rates not specifically covered by this Agreement; and (2) any matter involving the interpretation, application or violation of any provision of this Agreement. The grievance machinery may not be used to obtain a revision of, or addition to, the existing contract.

Section 2—Any employee having a grievance must process it in the following manner:

(a) Every employee shall have the option of presenting his grievance to his immediate foreman through his Shop Steward, or of personally taking up his grievance directly with his immediate foreman. In the latter case the Shop Steward will be present. If a satisfactory adjustment of the grievance shall not be reached in this manner, an earnest effort will be made to settle the matter in the following manner:

(b) Between any such aggrieved employee, represented by his Shop Steward, and the superintendent of the department involved. At this stage of the procedure the grievance shall be presented in writing and signed by the employee and his shop steward. At this stage of the procedure the shop steward can, if he feels it is necessary, call for the assistance of the chief steward. A written answer from the department superintendent shall be given to the shop steward within forty-eight (48) hours, Saturday, Sundays and holidays excepted.

(c) In the event that a settlement cannot be effected, arrangements will then be made for a meeting of the processing steward and the Chairman of the Grievance Committee with the Plant Personnel Director. The aggrieved employee or a representative of an aggrieved group may be present. The Personnel Director will be available on Tuesday and Thursday of each week between the hours of 10:00 A.M. and 12:00 Noon to discuss any grievance filed with the Personnel Department in writing on or before 10:00 A.M. of the preceding day, Saturdays, Sundays and holidays excepted.

The Chairman of the Grievance Committee shall be entitled to visit departments other than his own on Monday, Wednesday and Friday of each week, if required, for the purpose of investigating grievances which have passed the second stage (b) of the grievance procedure. No more than two (2) such visits per day on the listed days will be taken and the total elapsed time per day shall not exceed two and one-half (2½) hours, provided, however, that a special visit may be requested and shall be granted

at any time to investigate a grievance involving a matter of discharge.

(d) Between the Grievance Committee, the International Representative of the Union and the Plant Manager. In the absence of the Plant Manager, the Assistant Plant Manager or the Plant General Superintendent will represent the Management and his decision is final and binding on the Company. The aggrieved employee or a representative of an aggrieved group may be present. Consideration of grievances or disputes under this section shall be taken up on the second and fourth Fridays of each month. Consideration of grievances under this section will be confined to these days, provided, however, that a special meeting may be requested and shall be granted within three (3) days, Saturdays, Sundays and holidays excepted, for the purpose of considering, (a) a matter of discharge; or (b) a matter of dispute which cannot be reasonably delayed until the next regular meeting.

Section 3—After the above procedure has been followed, the Management or the Union must notify the other party in writing, within four (4) days following the meeting, of its decision; Saturdays, Sundays and holidays excepted. The complaining party must accept the decision and consider the matter settled, or, alternatively, within twenty-one (21) days, advise the other party of intent to arbitrate. Failure to advise of intent to arbitrate within this twenty-one (21) day period shall automatically constitute an acceptance of the decision.

Section 4—Decisions arrived at between the Committee and the Manager shall be final and binding on both parties.

Section 5—In the event that any such grievance, dispute or controversy shall not be settled in the manner provided above, either party may, within the time specified in Section 3 of this Article, request that it be submitted to arbitration before a single arbitrator selected from the panel listed below:

1. Lewis Gill
2. Matthew Kelly
3. Thomas Knowlton
4. Benjamin Roberts
5. Eric Schmertz

These Arbitrators shall be selected in rotation. If the Arbitrator selected is then unavailable within sixty (60) days, or declines to serve, the next Arbitrator shall be selected.

The Arbitrator shall immediately conduct a hearing and shall render his decision forthwith. The decision shall be in writing and shall be served simultaneously on both the parties to this contract. Said decision shall be final, conclusive and binding on all parties, and the parties shall immediately perform and comply with the terms of said decision. The fee, if any, of the arbitrator, shall be borne equally by the Company and the Union.

Should a discharged employee be reinstated by the arbitrator, said reinstatement shall be made with or without back pay at the discretion of the arbitrator. During any such arbitration hearing not more than two (2) such grievances, disputes or controversies shall be submitted.

Section 6—Only the president of the local Union, chairman of its Grievance Committee, its organizer, its attorney, or its business agent, shall have the right to

communicate with the Management for the purpose of making arrangements for the discussion of grievances.

Section 7—There shall be no work stoppage nor a threat of the same on the part of an individual or a group, nor a lock-out on the part of the Company, while a grievance is in the course of being prepared, presented, investigated, considered, or arbitrated. In the event of such a stoppage any investigation, preparation, consideration or arbitration of the grievance will be automatically suspended until such stoppage is ended and the employees have returned to work.

* * * * *

ARTICLE XV—SECURITY AND SEVERANCE PLAN

Effective July 1, 1974:

FORMULA

1% of Average Annual Earnings times Years of Service, *plus* $30.00 times Years of Service. (*Annual Earnings:* Straight time hourly earnings, which shall exclude *all* pay premiums of whatever nature, for the twelve consecutive calendar months immediately preceding date of lay-off, retirement, or death, divided by the straight time hours worked, multiplied by 2,080 hours).

ELIGIBLE:

All employees upon completion of Two (2) Years Service. (All "Years Service" shall be based on the Plant's Seniority Lists).

PAYMENTS:

Laid-off Employees (for lack of work only): After 14 calendar days on layoff, $50.00/week until either:

(a) Employee is recalled.
(b) Exhaustion of his amount accrued by Formula; provided, however, that the first twelve (12) weekly payments (if the employee is laid off that long) shall not be deducted from his amount accrued by Formula nor for those weeks for which the employee received State Unemployment Compensation.
(c) 52 weeks,

whichever first occurs.

In the event of (c) and an amount accrued remains, the employee shall have the option of: the remaining amount continuing on accrual; *or* receiving the remaining amount accrued in a lump sum payment.

Payments shall be made without regard to:

(1) Any other benefit or payment received by the employee.
(2) His employment status *except* as covered in (a) above.

An employee laid-off, recalled before (b) occurs and subsequently laid-off, shall have an accrued amount based on total years of service (figured to nearest complete calendar quarter) *less total* deducted payments received.

Pensioned Employees: At date of retirement under Company's Retirement Plan, or on the date of his established eligibility for benefits under the Company's Plan of Permanent and Total Disability Benefits, the employee shall have the amount accrued by Formula less total payment received, if any. Retirement payments shall re-

flect only laid-off benefit payments deducted; however, the first twelve (12) weekly payments (if the employee is laid-off that long) shall not be deducted from his amount accrued by the Formula nor for those weeks for which the employee received State Unemployment Compensation.

Death of an Employee: Upon the death of an employee his designated beneficiary shall receive an amount determined by Formula based on the employee's status at date of death. Death payments shall reflect only laid-off benefit payments paid: however, the first twelve (12) weekly payments (if the employee is laid off that long) shall not be deducted from his amount accrued by the Formula nor for those weeks for which the employee received State Unemployment Compensation.

Employees separated for any reason other than lay-off, retirement, permanent and total disability or death shall not receive any payments.

All payments provided hereunder shall be subject to statutory deductions or withholdings.

ARTICLE XVI—TENURE OF AGREEMENT

This Agreement shall become effective July 1, 1974 and shall remain in full force and effect through June 30, 1977, and from year to year thereafter, provided, however, that either party may give written notice to the other not less than sixty (60) days prior to June 30, 1977 of a desire to terminate or reopen the Agreement for the purpose of negotiating changes and revisions in the Agreement.

* * * * *

APPENDIX M

Excerpted ASARCO Incorporated Retirement Income Plan for Hourly Employees (Restated including Amendments through January 1, 1978)

Section 9. Non-Duplication of Benefits

Notwithstanding any other provision of the Plan, no Employee shall ever be entitled to a benefit under more than one Part of this Plan for the same period of service and no Employee who has been employed either by the Company or a subsidiary of the Company or by both shall ever be entitled to receive a benefit which for any reason would result in duplicating, in whole or in part, a benefit provided by either the Company or the subsidiary under this Plan, the Retirement Plan or any other plan or practice of the Company or subsidiary.

Section 10. Control and Authority Over the Operation and Administration of the Plan

10.1 Effective January 1, 1975, the Named Fiduciary shall be designated by the Board of Directors and shall have authority to control and manage the operation and administration of the Plan and shall be the Named Fiduciary with respect to control or management of the assets of the Plan, as herein provided. The powers of the Named Fiduciary to be exercised in the discretion of the Named Fiduciary shall include, but not be limited to, the power to allocate fiduciary responsibilities (other than trustee responsibilities) among other named fiduciaries, if any, and the power to appoint members of the Pension Board and designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee

responsibilities) under the Plan and to employ one or more persons to render advice with regard to any responsibility that any fiduciary may have under the Plan and the power to delegate authority to one or more investment managers to manage (including the power to acquire and dispose of) any assets of the Plan and to direct the Trustees and investment managers to the extent provided in any Trust Agreement or investment manager agreement, and the power to select an insurance company from which insurance contracts or policies may be purchased with assets of the Plan. Any such control, authority and power shall be implemented by executing appropriate written instruments to the extent possible and otherwise by oral direction. Any Trustee shall have exclusive authority and discretion to manage and control the assets of the Plan, except to the extent that (i) the Plan (including any Trust Agreement) provides that the Trustee is subject to the direction of the Named Fiduciary, in which case the Trustee shall be subject to the proper direction of the Named Fiduciary made in accordance with the terms of the Plan or (ii) authority to manage (including the power to acquire and dispose of) any assets of the Plan is allocated to one or more investment managers appointed by the Named Fiduciary.

10.2 The Named Fiduciary shall establish a claims procedure under which adequate notice will be provided in writing to any participant or beneficiary whose claim for benefits under the Plan has been denied, setting forth the specific reasons for denial written in a manner calculated to be understood by the participant, and afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review of the decision denying the claim.

10.3 Every "fiduciary", as such term is defined in Section 3(21) or ERISA, with respect to the Plan shall act as provided in Section 404(a)(1) of such Act solely in the interest of the participants and their beneficiaries and defraying reasonable expenses of administering the Plan with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matter would use in the conduct of an enterprise of a like character and with like aims and in accordance with the terms of the documents and instruments governing the Plan. No fiduciary shall be liable for an act or omission of another person in carrying out any fiduciary responsibility where such fiduciary responsibility is allocated to such other person by the Plan or pursuant to a procedure established in the Plan, except to the extent that:

(a) such fiduciary participated knowingly in, or knowingly undertook to conceal, an act or omission of such other person, knowing such act or omission to be a breach of fiduciary responsibility;

(b) such fiduciary, by failure to comply with Section 404(a)(1) of such Act in the administration of his or her specific responsibilities which give rise to status as a fiduciary, has enabled such other person to commit a breach of fiduciary responsibility;

(c) such fiduciary has knowledge of a breach of fiduciary responsibility by such other person, unless such fiduciary makes reasonable efforts under the circumstances to remedy the breach; or

(d) such fiduciary is a named fiduciary and has violated his or her duties under Section 404(a)(1) of such Act: (i) with respect to the allocation of fiduciary responsibilities among named fiduciaries or the

designation of persons other than named fiduciaries to carry out fiduciary responsibilities under the Plan or (ii) with respect to the establishment or implementation of procedures for allocation of fiduciary responsibilities among named fiduciaries or for designating persons other than named fiduciaries to carry out fiduciary responsibilities under the Plan, or (iii) in continuing the allocation of fiduciary responsibilities among named fiduciaries or the designation of persons other than named fiduciaries to carry out fiduciary responsibilities under the Plan.

10.4 Nothing in the Plan shall be construed to prohibit any fiduciary from:

(a) receiving any benefit to which the fiduciary may be entitled as a participant or beneficiary in the Plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the Plan as applied to all other participants and beneficiaries;

(b) receiving any reasonable compensation for services rendered or for the reimbursement of expenses properly and actually incurred in the performance of duties with respect to the Plan, except that no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the Plan, or from an employee organization whose members are participants in such Plan shall receive compensation from such Plan, except for reimbursement of expenses properly and actually incurred; or

(c) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

Section 11. Administration of the Plan

Subject to the provisions of Section 10.

11.1 The administration of the Plan and the responsibility of carrying out the provisions thereof may be delegated and allocated by the Named Fiduciary to a Pension Board of not less than five members who shall be officers or employees of the Company, appointed by the Named Fiduciary.

11.2 The Pension Board shall hold meetings upon such notice and at such times as it may from time to time determine, and minutes of any action taken at any meeting of the Pension Board shall be kept by a Secretary appointed by the Pension Board. The Secretary need not be a member of the Pension Board.

11.3 The Pension Board shall establish rules and regulations for the administration of the Plan and, except as otherwise expressly provided in the Plan, the interpretation of the Plan and determination of any questions as to the eligibility for or amount of benefits and service of an Employee or any question whatsoever arising in connection therewith, shall rest with the Pension Board.

11.4 In administering the Plan, neither the Board of Directors or any member thereof, nor the Named Fiduciary, nor the Pension Board or any member thereof, nor the Secretary of the Pension Board, nor the Company or any officer or employee thereof, shall be liable for any acts of omission or commission, except for his, her, or its own individual willful and intentional malfeasance or misfeasance. The Company, its officers and directors, and each member of the Pension Board shall be entitled to rely conclusively on all tables, valuations, certificates, opinions and reports which shall be furnished by an

actuary, accountant, trustee, counsel or other expert, including any such person who is an employee of the Company, who shall be employed or engaged by the Company or the Pension Board. The provisions of this Section 11.4 shall not be effective to the extent that they conflict with Section 410(a) of ERISA.

* * * * *

APPENDIX N

Excerpted Pension and Disability Agreement between American Smelting and Refining Company and Local Union No. 365, United Steelworkers of America (AFL-CIO)

PENSION AND DISABILITY BENEFITS AGREEMENT

This Pension and Disability Agreement (hereinafter called the "Agreement"), made this 28 day of April, 1977 by and between ASARCO Incorporated Perth Amboy Plant or Unit (hereinafter called the "Company") and Local No. 365 of the United Steelworkers of America, AFL-CIO (hereinafter called the "Union").

ARTICLE I—PENSIONS

Section 1. Subject to the Company's obtaining and/or retaining initial approval by the Internal Revenue Service of the amendments contemplated by this Agreement, the Company agrees to amend its Retirement Plan (hereinafter called the "Plan") effective as of July 1, 1974 (hereinafter called the "Effective Date"), in the following respects and by addition of "Part N" to the Retirement Income Plan for Hourly-Rated Employees of the Company.

To the extent to which the Plan, as amended to the Effective Date hereof, is applicable to Employees represented by the Union, it is hereby incorporated by reference and made a part of this Agreement.

Employees registered in Part B of the Plan shall continue to be covered thereunder and shall be credited with Part B accruals up to Normal Retirement Date (as herein-

after defined in Section 3.) However, in no event shall such Employees be entitled to retirement benefits which are less than the amounts calculated in accordance with the applicable provisions of Part N.

Section 2. Eligibility and Amount of Retirement Income Benefits:

Eligibility. Employees, not including terminated employees, covered under this Agreement who on or after the Effective Date have completed at least 5 years of Continuous Service (as defined in Article III of the Agreement) at Normal Retirement Date will be entitled at Retirement Date to a non-contributory benefit under this Part N.

Amount of Retirement Income Benefits. The amount of Retirement benefit for eligible employees retiring subsequent to the Effective Date shall be computed as follows:

(a) *Normal or Deferred Retirement.* Annual basic benefits of $11.00 for each month of Continuous Service up to 180 months, plus $12.50 for each month of Continuous Service in excess of 180 months and up to 360 months, if any, plus $14.00 for each month of Continuous Service in excess of 360 months, if any, subject to the provisions of Section 3 Article II.

(b) *Early Retirement.* Any Employee shall be eligible to retire prior to Normal Retirement Date provided the conditions set forth in one of the following paragraphs are satisfied:

70/80 Formula. Any Employee who is laid off due to the permanent shutdown of the total Plant at which he or she is employed and which is covered under the Agreement may elect to retire and receive a "70/80" retirement benefit, provided such employee:

(1) has reached age 55 and attained age plus Continuous Service totals 70 years or more, or

(2) has not reached age 55 and attained age plus Continuous Service totals 80 years or more.

* * * * *

ARTICLE III—PROVISIONS APPLICABLE TO BOTH DISABILITY AND RETIREMENT PLANS

Section 1. Appeals Procedure: If any difference shall arise between any employee (as defined in the Plans) and the Company as to:

(a) the number of years of Continuous Service of an Employee.

(b) the age of such employee; or

(c) whether permanent and total disability did or did not result from the cause listed in paragraphs (1), (2) or (3) of sub-section (b), Section 1 of Article II,

and if agreement cannot be reached between the Company, its representatives and such employee or the duly authorized representatives of such employee, the question may be submitted by either party for arbitration to the

American Arbitration Association. The arbitrator appointed by or through the American Arbitration Association shall have the authority only to decide the question pursuant to the provisions of this Agreement and of the applicable Plan, but shall not have authority in any way to alter, add to or subtract from any of such provisions. The decision of such arbitrator on any question submitted to arbitration and determined as herein prescribed shall be binding on the Company or its representatives and the employee and the duly authorized representatives of the employee. The expense of arbitration shall be borne equally between the parties unless they agree otherwise.

* * * * *

Section 6. Term of Agreement: The term of this Agreement shall be the period commencing as of July 1, 1974 and expiring June 30, 1977 and the Company agrees that, with respect to employees represented by the Union, it will not amend either Plan, except as provided herein and except to such extent as may be required to obtain and/or retain the approval of the Director of Internal Revenue, hereinabove referred to, or discontinue either Plan during such period.

* * * * *

Opposition

Office - Supreme Court, U.S.
FILED
OCT 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-177

IN THE

Supreme Court of the United States

October Term, 1981

AMERICAN SMELTING AND REFINING COMPANY AND FEDERATED METALS COMPANY, corporations authorized to do business in the State of New Jersey,

Petitioners,

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and its LOCAL UNION, No. 365, Labor Organizations,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1981

No. 81-177

AMERICAN SMELTING AND REFINING COMPANY AND FEDERATED METALS COMPANY, corporations authorized to do business in the State of New Jersey,

Petitioners,

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO and its LOCAL UNION, No. 365, Labor Organizations,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

In June of 1977, the American Smelting and Refining Company ("ASARCO") closed most of its Perth Amboy, New Jersey Plant, transferring its work to other ASARCO facilities. ASARCO paid terminated employees the benefit its collectively bargained Security and Severance Plan ("the Plan") provided employees who were laid off for lack of work.

Two months before the shutdown, ASARCO sold a small portion of the Perth Amboy Plant to its wholly owned subsidiary, the Federated Metals Company ("FMC"). FMC assumed all of ASARCO's obligations under its collective bargaining agreement. That agree-

ment expired on June 30, 1977 and, in June, FMC began negotiations for a successor agreement with the United Steelworkers of America (the "Steelworkers"). Negotiations failed and FMC's employees began a strike which lasted almost six months. It ended when FMC determined it could not meet the Union's demands and closed the plant. The employees whom the shutdown terminated requested their benefits under the Plan. FMC, in contrast to its parent, denied their request. The Steelworkers then grieved the denial and ultimately appealed its grievance to arbitration. When FMC insisted that the dispute was not arbitrable, the Steelworkers brought suit to compel arbitration. The action was removed to a Federal District Court in New Jersey which granted an order compelling arbitration. FMC did not appeal from that order and arbitration followed.

The arbitrator sustained the grievance, issuing an award and an opinion. He concluded that the grievance was arbitrable even though it arose after the contract had expired. On the merits, he found the Company obligated to pay the Plan benefit. He reasoned that FMC, like ASARCO, had closed its plant for economic reasons. FMC, he found, was "contractually and equitably" required to treat its employees as ASARCO had treated its.

The Company refused to implement the award, prompting this action by the Steelworkers for enforcement. Both the District Court and the Third Circuit Court of Appeals determined that the award had drawn its essence from the agreement and, hence, ordered its enforcement. ASARCO and FMC now bring this petition for review. Below, we explain why review is not warranted.

Argument

The petition poses a question the *Steelworkers Trilogy*[1] answered twenty years ago: what standard governs a court's enforcement of an arbitration award? The *Trilogy's* response was concise. It required enforcement of awards so long as they drew their essence from the collective bargaining agreement. *Enterprise Wheel & Car, supra.* In the decades which followed, parties unable to upset awards in litigation have asked this Court to reconsider the *Trilogy* rule or its application in a particular case. This Court has denied each petition.[2]

Two considerations support this Court's consistent refusal to interrupt the Circuits as they apply the *Trilogy's* clear principles. First, the occasional aberration

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[1] *United Steelworkers of America v. Enterprise Wheel and Car Corporation*, 363 U.S. 593 (1960); *United Steelworkers of America v. American Manufacturing Company*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574 (1960).

[2] See, *e.g.*, *Local 453, IUE v. Otis Elevator Co.*, 314 F.2d 25 (2nd Cir. 1963), *cert. den.*, 373 U.S. 949 (1963); *Bridgeport Rolling Mills Co. v. Brown*, 314 F.2d 885 (2nd Cir. 1963), *cert. den.*, 375 U.S. 821 (1963); *Ficek v. So. Pacific Co.*, 338 F.2d 655 (9th Cir. 1964), *cert. den.*, 380 U.S. 988 (1965); *Sheet Metal Workers v. Aetna Steel Prod. Corp.*, 359 F.2d 1 (1st Cir. 1966), *cert. den.*, 384 U.S. 839 (1966); *Newark Stereotypers' Union v. Newark Morning Ledger Company*, 397 F.2d 594 (3rd Cir. 1968), *cert. den.*, 393 U.S. 954 (1968); *Asbestos Workers, Local 66 v. Leona Lee Corp.*, 489 F.2d 1032 (5th Cir. 1974), *cert. den.*, 419 U.S. 829 (1974); *Steelworkers v. U. S. Gypsum Co.*, 492 F.2d 713 (5th Cir. 1974), *cert. den.*, 419 U.S. 998 (1974); *LaMirada Trucking v. Teamsters, Local 166*, 538 F.2d 286 (9th Cir. 1976), *cert. den.*, 429 U.S. 1062 (1977); *Boise Cascade v. Steelworkers*, 588 F.2d 127 (5th Cir. 1979), *cert. den.*, 375 U. S. 821 (1963); *Teamsters Local 878 v. Coca-Cola Bottling Co.*, 613 F.2d 716 (8th Cir. 1980), *cert. den.*, 100 S.Ct. 2975 (1981); *F. W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local No. 781*, 629 F.2d 1204 (7th Cir. 1980), *cert. den.*, 768 L.Ed.2d 324 (1981); *United Steelworkers of America v. Fort Pitt Steel Casting*, 635 F.2d 1071 (3rd Cir. 1980), *cert. den.*, 68 L.Ed.2d 843 (1981).

poses no threat to the *Trilogy's* continued preeminence in the federal labor law. Second, no one, including these petitioners, has ever proposed an alternative that improves upon the simple standard the *Trilogy* adopted.

Practitioners and courts have willingly accepted the *Trilogy's* standard. For twenty years, litigants have argued that particular awards either draw their essence from, or manifestly disregard, agreements. Aware that the finality of awards supports an important federal policy, the federal courts have considered these contentions and applied the *Trilogy's* standard. Their decisions, which turn on the intricacies of a hundred different facts, do not harmonize perfectly.[3] Among them are surely the odd cases where different courts, including this one, would reach different results though measuring with the same rule. But, these sport errors have not compromised the rule's vitality or diminished its acceptance by those who apply it regularly. It remains not only *the* rule but also a rule which preserves the finality of awards and, thus, arbitration's place at the cornerstone of industrial relations.

The *Trilogy* places severe restrictions on a reviewing court. It allows the simple inquiry of whether an arbitrator's decision "concerns the construction of the contract" but prohibits judicial analysis of the merits of awards. *Enterprise Wheel & Car*, 363 U.S. at 599. This court designed those restrictions to assure that awards *finally* resolved disputes over collective bargaining agreements as the parties intended. Court scrutiny of an award's merits or the rigor and persuasiveness of the arbitrator's interpretation would make the provision for finality meaningless. *Enterprise Wheel & Car, supra*.

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[3] Yet even Petitioners refrain from charging a conflict among the Circuits; it vaguely suggests "inconsistencies." Pet. at 27.

Were the award to become but a step upon the road to litigation, arbitration would lose its utility as a peaceful substitute for industrial strife. Judicial interference with awards, even those whose reasoning a judge finds unpalatable, would quickly sap employee allegiance to arbitration. Deprived of that allegiance, arbitration could not long occupy its central place in our national labor policy.

No alternative standard better preserves the finality of awards and arbitration's place than those which have served so well for twenty years. The new "rubrics" these petitions champion illustrate the point. They would vacate awards resting on "strained" reasoning or lacking a "logical" interpretation of the agreement. Petitioner would also overturn awards where the arbitrator's interpretation of the agreement relies too greatly on the "law" or "external circumstances." These are vague formulas, as opposed to the *Trilogy's* simple test. They would subject awards to greater, though ill-defined scrutiny and thus undercut their finality, the very prospect against which the *Trilogy* warned. *Id.*

Recognizing the futility of asking the *Trilogy's* revision, petitioners admit to a more modest goal.[4] They ask correction of the "error" they claim the Circuit made in applying the standard. The "error" concerns the propriety of one award, construing a particular agreement in light of the facts peculiar to this case. Thus, review would not advance the law or prevent future errors. Rather, in rectifying the lower court's "mistake," it would reaffirm principles in no need of reaffirmation. Surely, this purpose cannot justify review.

In any event, review would disclose no error. Demonstrably, the Court of Appeals discharged its function properly when it enforced the award.

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[4] Though in inviting this Court to gauge the "strain" of the arbitrator's reasoning and the "logic" of his interpretation, they ask an analysis different than the *Trilogy's*.

Petitioners make two attacks upon the award here. First, they dispute the arbiter's determination that a grievance arising after the expiration of the collective bargaining agreement was nonetheless arbitrable. Second, they challenge his finding that the Plan covered the employees FMC terminated when, unwilling to meet the Union's bargaining demands, it closed its plant. Neither disagreement establishes the arbitrator's manifest disregard for the contract.

The finding of arbitrability rests squarely on the agreement, which referred *all* unresolved grievances to arbitration, with no exception for grievances arising after the agreement had expired.[5] The arbitrator's interpretation predictably relied on *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers*, 430 U.S. 243 (1977) which construed a similar provision and concluded that the presumption of arbitrability extends to post-termination disputes. FMC's arbitration clause differed from *Nolde's* only in providing a panel of named arbitrators. The arbitrator concluded that the "bare use of named arbitrators" did not signify that the duty to arbitrate terminated along with the agreement. Pet. App. 81a-82a.

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[5] Petitioners consciously obscure the fact that they challenge an *arbitrator's* finding of arbitrability, and not a court's. But that fact is crucial for three reasons. First, a court had compelled this arbitration in an order from which Petitioners took no appeal. Thus, Petitioners must establish that they are not foreclosed from seeking subsequent judicial relief from the arbitrator's independent finding of arbitrability. Second, Petitioners must show that a proceeding to enforce an award presents an appropriate context within which to review an issue of arbitrability. The odds are long since courts generally determine arbitrability in actions to compel, or stay, arbitration. The standards for compelling arbitration differ from those for enforcing awards. Thus, review here would necessarily concern a uniquely narrow issue. Finally, the prohibition against judging an award's merits makes review unpromising where the award at issue applies the very strong presumption favoring arbitrability.

The Company does not charge that the arbitrator failed to interpret the agreement, but rather that he misinterpreted it, extending *Nolde* without warrant. The *Trilogy* ruled that misinterpretation is no ground to refuse enforcement of an award. *Enterprise Wheel & Car, supra.* This rule applies even though the misinterpretation rests on an erroneous prediction of how courts will develop the principles which admittedly govern the dispute. *Cf. Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*, 442 F.2nd 1234, 1239 (D.C. Cir. 1971).

The arbitrator interpreted the Plan as covering the terminated employees. He recognized the Plan's restriction of benefits to employees laid off for lack of work. Thus, he framed the issue as whether "plant closings" cause a "layoff because of lack of work." Pet. App. 82a. He found that FMC's plant had closed, at least in part, for economic reasons growing out of the strike. *Id.* He considered whether the strike precluded his treating the shutdown as "a unilateral management act that created a 'lack of work'." Pet. App. 83a. He concluded it should not because the strike, like the plant closing, was a lawful economic action which should neither benefit nor prejudice either party. *Id.*

Since the strike was immaterial, the arbitrator evaluated the evidence he deemed the most significant. This was the manner in which ASARCO had applied the Plan's provisions when it closed the largest portion of the plant. ASARCO paid the benefit, though economic factors prompted the shutdown. The arbitrator found that similar economic conditions had motivated the FMC closing. He concluded that the FMC owed the benefit, both "contractually and equitably," under the Agreement it had assumed from its corporate parent. Pet. App. 83a-84a.

The Third Circuit analyzed the award thoroughly. It noted the arbitrator's conclusion that "the parties intended that 'lack of work' would encompass all economic layoffs."[6] Pet. App. 13a. At that the Circuit could have stopped, since the award satisfied the *Trilogy* test that the "decision concerns construction of the contract." *Enterprise Wheel and Car*, 363 U.S. at 599. Nonetheless, it gave petitioner the benefit of the doubt and analyzed as well the interpretation's plausibility, the evidence which supported it, and the manner the arbitrator applied it to the facts before him.

The Court of Appeals found the arbitrator's interpretation rational. It theorized that the parties used "lack of work" by way of contrasting economically motivated job separations to disciplinary terminations. Pet. App. 13a. Further, it found the arbitrator reasonably inferred from the evidence that "lack of work" intended more than the "lack of orders" which FMC understood. FMC's parent, ASARCO, had paid the benefit even though it had closed for broader economic reasons than a lack of orders.[7] *Id.*

[6] Petitioners do not accept this as the arbitrator's analysis, insisting it is the Circuit's. We cannot ascribe petitioners' insistence to obduracy alone. The arbitrator's exposition, though equating layoffs for lack of work with economically induced terminations, lacks precision at points. Ambiguity, however, cannot defeat an award. As the *Trilogy* notes, arbitrators need not explain their awards and a judicial demand for complete clarity would prompt arbitrators to withhold opinions. *Enterprise Wheel and Car*, 363 U.S. at 598. Thus, where ambiguity occurs, courts ought not assume an arbitrator "has abused the trust the parties confided in him and has not stayed within the areas marked out for his consideration." *Id.*

[7] Of course, in construing "lack of work" the arbitrator responded to the specific interpretations the parties advanced before him. In its brief, the Company asserted that lack of work meant "a falling off in the terms of the need for the product" thus equating "work" with "orders" or "demand." Company Brief to the Arbitrator 25, Resp. App. at 17. The ASARCO shutdown refuted this narrow interpretation. There, the company admitted, the shutdown was a management decision to close a specific facility "although it clearly stayed in

(Footnote continued on following page)

Finally, the Circuit tested the arbitrator's application of his interpretation to the facts before him. Like the arbitrator, it recognized that the problem of application arose because the Company insisted that the strike distinguished FMC's shutdown from ASARCO's. The arbitrator rejected that contention and found that FMC, like ASARCO, had closed for economic reasons. The Circuit also recognized that the shutdown sought to avoid higher labor costs, an economic item. Pet. App. 14a.

Satisfied not only that the award rested on the arbitrator's construction of the agreement—but also that the construction was plausible, supported by evidence, and rationally applied—the Court of Appeals required enforcement.[8] The *Trilogy* demanded no less.[9] Petitioners urged the Circuit to go further, to test the arbitrator's construction against its own. This, the *Trilogy* forbade.

(Footnote continued from preceding page)
the refining business, but had the work done elsewhere . . ." Tr. of Arbitration, Appendix on Appeal, p. 145, ll.15-18. The Union stressed this concession, emphasizing that the Company itself "admitt[ed] there was work. You went to Amarillo, You went to Tacoma." *Id.* p. 156, ll.24-5.

[8] We have not addressed the two of the Petitioners' arguments which FMC did not preserve below. First, it contends "layoff" cannot comprehend a permanent termination, but only a temporary one. It made no such contention to the arbitrator but admitted to him that the employees in this case were "laid off because the plant shut down." Company's Brief to the Arbitrator, p. 25. Resp. App. 17. Second, it claims that the Plan does not provide for benefits to survive the collective bargaining agreement. It did not make this argument before the arbitrator. There, it contended that benefits were not payable because it had unilaterally and lawfully "cancelled the plan as an employee benefit" three months after the contract expired. *Id.* at p. 21. Resp. App. 14. This argument recognized that the contract's expiration did not itself affect employee rights under the Plan. Thus, FMC forewent the "lay off" and "survival" issues by failing to raise them before the arbitrator. *United Steelworkers of America v. Smoke-Craft, Inc.*, _____ F.2d _____, 108 LRRM 2218, 2220 (9th Cir. 1981).

(Footnote continued on following page)

Conclusion

FMC and the Steelworkers agreed to arbitrate disputes over the interpretation of their collective bargaining agreement. They agreed that arbitration awards would be final and binding. The *Trilogy* recognized that such agreements limit judicial examination of awards to the narrow inquiry of whether they concern the construction of the contract. The Court of Appeals respected its limited function, found that this award concerned the construction of the contract and directed enforcement.

(Footnote continued from preceding page)

Moreover, even in the Circuit Court FMC presented a significantly different version of the survival issue than that which the Petition raises. There it isolated from an integral plan a "security" and a "severance" benefit, and argued that the contract's expiration extinguished the former but not the latter. The Circuit made short work of the argument, noting that it had not been put to the arbitrator and that there was no textual support in the Plan for the dissection the Company had performed. Pet. App. 14a-15a.

[9] While Judge Rosenn agreed the dispute was arbitrable, two factors lead him to dissent. First, he objected to the arbitrator's interpretation of layoffs for lack of work as all economically motivated terminations and he disagreed that the term "lay-off" could apply to a permanent separation. Pet. App. 23a-24a. Judge Rosenn apparently ascribed the arbitrator's interpretation to his consideration of ASARCO's conduct in closing its plant. *Id.* 26. To Judge Rosenn, this evidence was irrelevant: he found no evidence in the record either that ASARCO had laid employees off, as opposed to terminating them, or that it had paid benefits pursuant to the Plan. The Company, however, had never sought to distinguish ASARCO's payments on this basis. In its brief to the Arbitrator, it conceded that "employees who were premanently separated from ASARCO when the refinery shut down received benefits under the Plan." Brief to the Arbitrator, p. 25. Resp. App. at 17. Second, Judge Rosenn faulted the arbitrator's failure to interpret the Plan's provisions to determine whether its benefits survived the agreement's expiration. Pet. App. 27a. But FMC had never urged before the arbitrator that the Plan, properly construed, limited benefits to the term of the collective bargaining agreement. See n. 9, *supra*.

Even had Petitioners shown that the Circuit had erred, review would be inappropriate. This court could only reaffirm the *Trilogy's* principles. For twenty years this court has denied each petition pressed by a litigant disappointed with an award. In doing so, the court recognized the *Trilogy* as a bulwark in federal labor law whose principles need no bolstering by periodic reaffirmation. Because it could not advance the law that now exists, a law the federal courts fully recognize and regularly apply, review is not warranted.

Respectfully submitted,

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RESPONDENTS' APPENDIX

NEW JERSEY BOARD OF MEDIATION

In the Matter of the Arbitration

between

UNITED STEELWORKERS OF AMERICA, AFL-CIO, & LOCAL PERTH AMBOY SMELTER AND REFINERY WORKERS UNION #365

and

FEDERATED METALS COMPANY.

Before Arbitrator Eric J. Schmertz, Esq.

BRIEF ON BEHALF OF THE COMPANY

. . . .

[19] **II. FMC did not violate the security and severance plan of the 1974-1977 agreement because when the shutdown occurred in January, 1978, said plan was not in effect.**

An impasse in collective bargaining negotiations occurs after negotiations have been carried on for a period of time, the positions of the parties have been fairly well fixed and talks reach a point of stalemate. When an impasse occurs, an employer is free, under the National Labor Relations Act, 29 U.S.C., Sec. 151 *et seq.*, to make unilateral changes in wages, hours and working conditions as long as those changes are consistent with his pre-impasse bargaining position. *NLRB v. Almeida Bus Lines, Inc.*, 333 F.2d 729, 56 LRRM 2548 (1st Cir. 1964); *Eddie's Chop Shop*, 165 NLRB 861, 65 LRRM 1408 (1967); *American Laundry Machinery Co.*, 107 NLRB

1574, 33 LRRM 1457 (1954). This right to make unilateral changes is not limited to increases or improvements in wages and benefits; rather, the right includes the freedom to decrease wages or remove benefits as long as the decrease or removal is consistent with the pre-impasse bargaining position. *Empire Terminal Warehouse Co.*, 151 NLRB 1359, 58 LRRM 1589 (1965), *aff.* 355 F.2d 842, 61 LRRM 2065 (D.C. Cir. 1966); *Texas Cinema Corp.*, 208 NLRB 226, 85 LRRM 1316 (1974); *cf. Palomar Corp.*, 192 NLRB 592, 78 LRRM 1030 (1971), *enf.* 465 F.2d 731, 80 LRRM 3217 (5th Cir. 1972) where the following was stated:

> [20] "It is elemental, of course, that an employer may unilaterally alter existing wages or other terms and conditions of employment in situations where, after having bargained with the collective-bargaining agent in good faith, an impasse has been reached." (*Id.* at 596).

Here, negotiations for a new agreement between FMC and the Union commenced in June, 1977. The collective bargaining agreement terminated as a result of Union termination notice. By mid-October, 1977, the parties had been negotiating for four months; the Unions had been on strike for 3½ months. Positions had becomed hardened and fixed—the Unions desired an agreement similar to and consistent with copper refinery industry agreements (as was the 1974-1977 Agreement with ASARCO) and FMC, not being in the copper refinery business, insisted upon an agreement which would be applicable to, and make the company competitive within, the secondary metals industry. In other words, an impasse had been reached.

As part of that impasse, the parties disagreed over security and severance. The Union desired a continuation of the Plan in the 1974-1977 Agreement. The Company took the position that the 1974-1977 Agreement's Plan was no longer in effect[4] and that a new and different plan would have [21] to be established by negotiations. An impasse was reached on this issue.

After bargaining was at an impasse, FMC, as it had a right to do, unilaterally implemented its pre-impasse position on security and severance. It cancelled the 1974-1977 Plan as an employee benefit. It advised the Unions that a new plan would be "effective upon resumption of operations." It advised its employees that modifications would be made in the Security and Severance Plan (JX 13). Thus, following FMC's unilateral actions, there was *no* security and severance benefit in effect. FMC had cancelled it as it was permitted to do. When the shutdown occurred, therefore, there was no severance pay provision in effect and the employees were not entitled to severance benefits.

[22] III. FMC did not violate the security and severance plan of the 1974-1977 agreement because employees terminated as a result of the shutdown were not laid off for lack of work, a condition precedent under the plan for benefits.

The Union urges the Arbitrator to find that, since the employees' employment relationship with FMC was severed by the shutdown, the employees are entitled to benefits under the Plan. To the contrary, however, the

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[4] Whether FMC advised the Union that the prior Plan was no longer in effect on June 24, 1977 as testified by Mr. Harris (Tr. 45) or on October 15, 1977 as testified by Mr. Petit-Clair (Tr. 75), it is undisputed that, at some time during negotiations, FMC's position was that the prior Plan would not continue.

Plan does not provide benefits for employees *whenever* a severance or termination occurs; rather, the Plan's benefits are limited to employees who are laid off for *lack of work only*.[5]

As with the application of language in any provision in a collective bargaining agreement, the Plan must be applied consistent with the intent of the parties. Here, the intent of the parties was not to provide benefits for employees laid off for any reason other than lack of work. Thus, the Plan provides as follows:

> "PAYMENTS: Laid-off Employees (for lack of work only) . . ."
>
> * * *
>
> "Employees separated for any reason other than layoff, retirement, permanent and total disability or death shall not receive any payments."

[23] The foregoing language is clear and unequivocal and cannot be given a meaning other than that expressed. The phrase, "for lack of work only," must be given meaning and effect and cannot be ignored or viewed as surplusage. Indeed, the Union does not dispute that the Plan is limited to layoffs for lack of work only. During negotiations for the 1974-1977 Agreement, the Union sought to have the Plan changed to include all employees *terminated for all reasons* (Tr. 65); however, such proposal was not part of the final settlement (Tr. 67-9). Additionally, at the hearing, Union Counsel did not take issue with FMC's statement that the Plan was restricted to layoffs for lack of work only.

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[5] The Union's claim herein is that the approximately 94 employees whose employment relationship with FMC was severed by the shutdown are entitled to benefits as "laid-off employees" under that portion of the Plan entitled "Payments [for] Laid-Off Employees."

Severance pay, generally, is not an acknowledgement of indebtedness for past services but arises purely and strictly out of an agreement which provides for such severance pay and, like any other benefit provided by contract, it is payable only when the conditions and contingencies triggering the payment are met. *Empire Textiles Corp.*, 44 LA 979 (Scheiber, 1965). Here, the condition or contingency an employee had to satisfy was, as shown, a layoff for lack of work. If the layoff was *not* for lack of work, no benefits under the Plan are due. See, *e.g., General Electric Co.*, 50 LA 62 (Rentfro, 1967), where the contract provided a severance benefit "in the event of layoff for lack of work [24] or plant closing." Arbitrator Rentfro held that the provision did not provide severance pay to all employees who were severed from the payroll but only to those who were laid off for lack of work or plant closing and, therefore, the claimant properly was denied a benefit.

Here, FMC's employees were not laid off for lack of work. As stipulated by Union Counsel (Tr. 40), there was sufficient work at FMC's Perth Amboy operation in January, 1978 for the Company to continue to operate. More particularly, during the strike and at the shutdown FMC had work—it received and logged orders and would have resumed production if the employees returned to work (Tr. 31). Indeed, in November and December, 1977, FMC solicited the striking employees to settle and return to work (Tr. 15; JC 12, 13, 19).

Accordingly, the essential condition or contingency triggering severance pay—a layoff for lack of work—has not been shown. As noted, there was work and the layoff was not for lack of work. Thus, no severance pay is due.

The Union may argue that since the shutdown was the result of an impasse in negotiations, there was work to be performed only if the Unions accepted FMC's bargaining proposals and since FMC would not permit the employees to work under the terms *sought by the Union*, there was a lack of work. In other words, the Union may argue, an employee's [25] refusal to perform available work except under the terms and conditions sought by him through his union is the equivalent of a lack of work, *i.e.*, the Union may equate the availability of a job to the wages, benefits and conditions flowing from the performance of that job. This argument is untenable. It is undisputed that there was work for employees to perform. The employees, however, refused to do it unless it was *on their terms*. Lack of work, as used in the Agreement means a falling off of the need for a product and that the work is thereby adjusted to reduce the output or administrative needs require a delay in production. Here, however, the overwhelming fact is that there was work and no extraneous economic dispute can change that fact. The employees were laid off because the plant shut down. That shutdown, however, was not caused by a lack of work; rather, it was caused by the employees' failure to perform the work unless it was on their terms. In these circumstances, the layoff was not for lack of work and the employees are not entitled to severance benefits.[6]

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[6] The fact that employees who were permanently separated from ASARCO when the refinery shut down received benefits under the Plan (Tr. 18) is not inconsistent with the denial of benefits here. The ASARCO shutdown was not caused by employees refusing to work except on their terms; the shutdown was unconnected to a bargaining dispute and there was, in fact, a lack of work for employees (Tr. 28).

[26] To be sure, other arbitrators have found severance benefits to be due where, as here, employees are laid off because of a plant shutdown after a strike and/or bargaining impasse. In none of those awards, however, did the contract, as here, restrict the payment of severance benefits to layoffs for lack of work only. For example, in *Bunn-O-Matic Corp.*, 70 LA 34 (Talent, 1977), the contract granted severance pay "Whenever an employee is terminated because of the closing of the plant . . .". in *H.K. Porter Co.*, 49 LA 147 (Cahn, 1967), the contract provided a severance allowance if the company ". . . close[d] permanently a plant—and terminate[d] the employment of individuals." In *Brooklyn Eagle, Inc.*, 32 LA 156 (Wirtz, 1959), the contract provided for a severance indemnity for "each employee dismissed" (with certain exceptions inapplicable here). See also *Nolde Bros., Inc. v. Bakery Workers, supra*, where, in determining the arbitrability of the severance pay claim, the Supreme Court had before it a contract providing severance compensation as follows:

> "Each full-time employee who is permanently displaced from his employment with the Company by reason of the introduction of labor saving equipment, the closing of a department, the closing of an entire plant, or by lay off, [shall receive severance pay] . . ."

[27] Here, the parties could have, if they desired, agreed to a severance pay clause granting benefits to any employee dismissed or severed for any reason; however, they did not do so. Rather, as shown, they agreed to severance pay only where an employee is laid off for lack of work. That restriction cannot be ignored.